

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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HEALTHY ADVICE NETWORKS, :
LLC, :
Plaintiff, :
vs. : CASE NO.1:12-cv-00610
:
CONTEXTMEDIA, INC., :
Defendant. :

- - -

Deposition of KEVIN ARST, a witness herein,
taken by the plaintiff as upon cross-examination,
pursuant to the Federal Rules of Civil
Procedure and pursuant to agreement by
counsel as to the time and place and
stipulations hereinafter set forth, at the
offices of Frost Brown Todd, 3300 Great American
Tower, 301 East Fourth Street, Cincinnati, Ohio,
at 9:20 a.m. on Friday, August 15, 2014,
before M. Sue Lopreato, RMR, CRR and Notary
Public within and for the State of Ohio.

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1 APPEARANCES:

2 On behalf of the plaintiff:

3 GRANT S. COWAN, ESQ.
4 Frost Brown Todd, LLC
5 3300 Great American Tower
6 301 East Fourth Street
7 Cincinnati, Ohio 45202

8 On behalf of the defendant:

9 THOMAS F. HANKINSON, ESQ.
10 Keating Muething & Klekamp, PLL
11 One East Fourth Street
12 Suite 1400
13 Cincinnati, Ohio 45202

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S T I P U L A T I O N S

It is stipulated by counsel for the
respective parties that the deposition of
KEVIN ARST, a witness herein, may be taken at this
time by the plaintiff as upon cross-examination
and pursuant to the Federal Rules of Civil
Procedure, all other legal formalities
being waived by agreement; that the
deposition may be taken in stenotypy by the
Notary Public-Court Reporter and transcribed
by her out of the presence of the witness;
that the transcribed deposition was
submitted to the witness for examination
and signature and that signature may be
affixed out of the presence of the Notary
Public-Court Reporter.

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I N D E X

BY MR. COWAN:

PAGE

Cross

5

EXHIBITS

Exhibit

Marked

Plaintiff's 1

6

Plaintiff's 2

24

Plaintiff's 3

25

Plaintiff's 4

25

Plaintiff's 5

72

Plaintiff's 6

113

Plaintiff's 7

133

Plaintiff's 8

134

Plaintiff's 9

135

Plaintiff's 10

151

Plaintiff's 11

190

Plaintiff's 12

191

Plaintiff's 13

202

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1 KEVIN ARST
2 of lawful age, a witness herein, being first
3 duly sworn, as hereinafter certified, was
4 examined and deposed as follows:

5 CROSS-EXAMINATION

6 BY MR. COWAN:

7 Q. Good morning. Could you state
8 your name.

9 A. My name is Kevin Arst.

10 Q. Mr. Arst, my name is Grant
11 Cowan. We introduced a minute ago. As you
12 know, I'm one of the attorneys representing
13 Healthy Advice in this lawsuit against
14 ContextMedia. I'm here to take your
15 deposition today. I assume you've been
16 deposed before?

17 A. Yes.

18 Q. On a number of occasions?

19 A. Yes.

20 Q. Do you have a pretty good
21 understanding of the basic rules?

22 A. I do.

23 Q. What were you engaged to do in
24 this case?

1 A. I'll refer you to my expert
2 report on page 1, Section 3. I detailed my
3 assignment as being 284 Partners has been
4 retained in order to provide opinions
5 regarding the issue of damages in this
6 lawsuit.

7 I was also asked to review and
8 assess the claims of HAN for monetary damages
9 as advanced by Dr. Wilner.

10 Q. Let's go ahead. You brought a
11 copy of your report?

12 A. I did, along with some of the
13 other supporting materials.

14 MR. COWAN: Okay. Let's go
15 ahead and, for the record, I'm going to mark
16 a copy of your report.

17 (Plaintiff's Exhibit No. 1
18 was marked for identification.)

19 Q. Feel free to refer to the one
20 you brought, if you prefer. I just want to
21 make sure we have a copy for the record, a
22 copy of your report.

23 A. That makes sense.

24 Q. Just if you could, review

1 Exhibit 1 to see if it appears to be a true
2 and accurate copy of your report, and then
3 you can put it aside and refer to your own.

4 A. It does appear to be a copy of
5 my report. I do note my report, I believe,
6 was prepared in color and also on
7 single-sided, but otherwise, it looks to be
8 the same.

9 Q. Okay. So refer me again on
10 page 3 of your report to where your report
11 describes your engagement.

12 A. I'm sorry. Section 3 on page 1.

13 Q. Okay. That's what was confusing
14 to me. Section 3, page 1?

15 A. It's at the bottom of the page
16 there.

17 Q. Right. Were you engaged to do
18 anything else, other than what is reflected
19 in Section 3?

20 A. That represents, I think, a fair
21 statement regarding my engagement.

22 Q. What do you believe qualifies
23 you to be an expert on the issues involved in
24 this case, at least those upon which you are

1 going to provide expert testimony?

2 MR. HANKINSON: Objection.

3 Form.

4 A. I'll refer you to Appendix A of
5 my report. It's part of Exhibit 1, which
6 provides a detail of my professional
7 experience, education, and certifications.

8 I've been engaged professionally
9 in valuation as a professional who assesses
10 commercial damages in the context of civil
11 disputes for roughly 15 years now.

12 I'm a certified public
13 accountant licensed in the State of
14 California. I'm certified in financial
15 forensics by the AICPA. I'm a certified
16 licensing professional by the LES, which is
17 an Intellectual Property Trade Association
18 that deals with intellectual property
19 licensing and valuation issues.

20 I've authored articles about
21 valuation and damages related issues. I've
22 taught courses, or at least lectured as a
23 guest in a university setting about damages
24 related issues.

1 In all, I think I've likely
2 consulted on well over a hundred, probably
3 over 200 matters, including other cases with
4 similar fact patterns as this one. Does that
5 provide a fair summary for you?

6 Q. It does. Have you ever been
7 engaged by either of the two law firms that
8 are representing ContextMedia in this case
9 prior to this engagement?

10 A. Yes, with respect to Sidley
11 Austin. I don't recall with respect to KMK.
12 I don't have a perfect recollection of all
13 the various law firms that have been involved
14 in the cases that I've worked on in the
15 course of my career.

16 Q. What cases do you recall having
17 been engaged on by Sidley Austin?

18 A. Our standard engagement letter,
19 and the engagement letters of firms that I've
20 worked for before, 284 Partners requires that
21 I keep in confidence matters that are not
22 publicly available.

23 I can recall certain
24 engagements, including some in which I've

1 provided testimony, and I can refer you to my
2 CV for those.

3 But there are other matters in
4 which I'm not going to be able to disclose
5 the parties, but perhaps I could provide a
6 general background about some of the issues
7 in those cases, if that would be of interest
8 to you.

9 Q. It would be helpful.

10 A. Okay. Well, let's start with,
11 if it's all right with you, the cases on my
12 CV in which I've provided oral testimony.

13 Q. Right.

14 A. I'm on page 4 of my CD, fourth
15 page down, Prism Technologies, LLC, versus
16 United States Cellular Corporation.

17 Q. You testified on behalf of
18 U.S. Cellular?

19 A. That's correct. Just so we're
20 on the same page, my last answer was
21 incomplete, though. I was going to keep
22 working down the list.

23 Q. Okay. I assume that you were
24 starting here and going to keep working down.

1 A. Yes.

2 Q. Why don't we go through, and
3 I'll just check off the cases that are on
4 page 4 of your CV, where you were engaged by
5 Sidley Austin.

6 A. Sure. More of the companies
7 that Sidley Austin represents, but the --

8 Q. Fair enough.

9 A. -- United States Cellular
10 Corporation matter, the Ibbotson Associates
11 and Morningstar matter, The Home Depot
12 matter, the Delta Airlines matter, and the
13 Competitive Edge matter, and the Ethicon
14 Endo-Surgery matter.

15 There are two Ethicon
16 Endo-Surgery matters, the Covidien case and
17 the Crescendo Technologies case. I'm talking
18 about the Crescendo Technologies case. In
19 fact, I believe your firm was local counsel
20 on the Ethicon Endo-Surgery versus Covidien
21 matter.

22 And that's a subset of my
23 experience. Those are cases in which I
24 provided oral testimony. There are other

1 cases in which I was retained to provide
2 consulting services, or perhaps where I was
3 retained to potentially provide expert
4 testimony, and the cases didn't evolve in
5 that direction and/or I had served as a
6 consulting expert.

7 Q. And again, those are -- we're
8 focusing on cases where you were engaged by
9 the Sidley Austin firm on behalf of their
10 client?

11 A. Sometimes engagement letters are
12 structured as the law firm is engaging the
13 consultant on behalf of the corporate client.
14 Sometimes they're structured as the corporate
15 client is retaining.

16 I don't recall precisely, but in
17 substance, those were matters in which Sidley
18 Austin had some involvement.

19 Q. Exactly. Thanks. And how many
20 of those matters are we talking about?

21 A. I don't understand the question.

22 Q. So I think we've identified, on
23 pages 4 and 5 of your CV, engagements
24 involving Sidley Austin where it actually

1 resulted in a lawsuit and you gave testimony.

2 Is that fair?

3 A. That's all that's reflected on
4 my CV.

5 Q. Right. Then I thought -- and
6 maybe I just misunderstood you. I thought
7 that in addition to what's reflected on your
8 CV, there had been other engagements
9 involving Sidley Austin where you served a
10 role either as a consultant, or a consultant
11 with the idea of possibly becoming an expert,
12 but you ended up not giving expert testimony;
13 is that correct?

14 A. That's fair.

15 Q. And with respect to that
16 category that we just described,
17 approximately how many of those engagements
18 were there?

19 A. I don't know precisely. I would
20 expect the number of matters in which I've
21 consulted that involved Sidley Austin is
22 roughly 15 matters or so. I just don't
23 recall precisely.

24 Q. Other than this case, "this

1 case" being the ContextMedia case, have you
2 been involved in any other cases where
3 Mr. O'Brien, Richard O'Brien, was the lead
4 counsel?

5 A. It's not always clear to me what
6 roles different counsel play on the
7 engagement teams, so I don't know.

8 Q. Had you had any prior engagement
9 where you interacted with Mr. O'Brien prior
10 to the ContextMedia case?

11 A. I interacted with Mr. O'Brien on
12 several cases. I don't recall what his role
13 might have been in those cases, in addition
14 to this case.

15 Q. Do you recall if those cases
16 involved Lanham Act false advertising claims?

17 A. Not to my recollection, meaning
18 I don't believe that they did.

19 Q. Earlier you indicated, I think,
20 that you had been engaged or been involved in
21 some hundred, possibly 200 legal matters,
22 some involving similar fact patterns as this
23 case. Give me a few examples.

24 A. Sure. I'm recalling a case

1 involving Bulk Containers, which was a Lanham
2 Act case involving alleged false advertising.

3 I've worked on a series of other
4 false advertising cases, including the
5 Honeywell versus ICM Controls matter, which
6 is a false advertising case.

7 I've also worked on other cases
8 involving other forms of intellectual
9 property where the measures of monetary
10 relief that are available are similar like
11 Lanham Act; for example, copyright cases.

12 And so I think that those cases
13 do have some relevance with respect to my
14 opinions here.

15 Q. The case involving the Bulk
16 Containers, who was your client?

17 A. That's not a matter that is --
18 my involvement isn't a matter of public
19 record, so I don't believe I'm at liberty to
20 disclose that to you.

21 Q. And when you say your
22 involvement is not a matter of public record,
23 does that mean that you were engaged to
24 consult but not necessarily render expert

1 testimony that would be publicly disclosed?

2 A. That's fair. I did not render
3 any public testimony.

4 Q. Were you engaged by the
5 plaintiff or the defendant in the Bulk
6 Container case?

7 A. If memory serves, there were
8 claims going both ways in that case. So I
9 think there was a counterclaim. I believe
10 they were the defendant in the original suit.

11 Q. And are you permitted to give me
12 a general description of the facts in that
13 case, or would that be contrary to your
14 engagement limitations?

15 A. My general understanding is that
16 I'm not permitted under our engagement
17 letters to disclose facts related to
18 engagements that are not a matter of public
19 record.

20 So I think I could -- are you
21 interested in understanding the facts about
22 that particular engagement, or are you
23 interested in understanding the nature of my
24 opinions about damages?

1 Q. Probably both. But I don't want
2 to get you edgewise with any contractual
3 obligations you have, or ethical obligations
4 you have.

5 Let me ask you this: Can you
6 tell me whether or not the case involving
7 Bulk Containers involved allegations of
8 literally false statements made by one of the
9 parties?

10 A. I don't recall that.

11 Q. The Honeywell case, that's a
12 case that presumably is available online.
13 What can you tell me about your involvement
14 in the Honeywell case?

15 A. I was retained by ICM Controls
16 and testified on issues related to damages.
17 That is a case that is pending right now in
18 the United States District Court, District of
19 Minnesota, scheduled for trial, I believe in
20 January of next year.

21 Q. Did you give a deposition in
22 that case?

23 A. I did.

24 Q. And did any of your opinions in

1 that case involve issues relating to
2 literally false statements?

3 A. I don't recall.

4 Q. What do you recall being the
5 focus of your opinions in that case?

6 A. Damages related issues.

7 Q. And what types of claims?

8 A. That case has three utility
9 patents at issue. There were claims of false
10 advertising, false designation of origin,
11 copyright infringement. And I provided
12 opinions on damages related to each of those
13 forms of intellectual property.

14 Q. Do you recall the nature of the
15 false advertising claims?

16 A. I do recall there were some
17 claims with respect to whether a product was
18 made in the USA. I believe that's a matter
19 of public record.

20 Q. Did any of your opinions go to
21 the issue of causation?

22 A. Yes.

23 Q. How so?

24 A. All consistent with my opinions

1 in this matter. I think it's important to
2 evaluate causation related issues when
3 determining damages and considering lost
4 profits, and also when considering profit
5 disgorgement remedies, including the portion
6 of profits that are attributable to the
7 alleged wrongful conjunct, vis-a-vis other
8 contributions that the defendant may have
9 made to the product of that issue.

10 And as part of that, I typically
11 evaluate issues related to causation,
12 including drivers of demand alternatives,
13 capacity, and so forth.

14 Q. Have you ever testified for a
15 plaintiff in a case involving claims of false
16 advertising?

17 A. If we're limiting it to cases in
18 which I provided oral testimony, no.

19 Q. Have you ever provided oral
20 testimony on behalf of a defendant in a case
21 where the defendant was accused of making
22 literally false statements to a customer?

23 A. I don't recall all the matters
24 that I've consulted on over the course of my

1 career. I do note that the ICM Controls,
2 Honeywell matter had an element of false
3 advertising. I don't recall whether there
4 were allegations of literal falsehood.

5 So that's one potential that I
6 would have to investigate; otherwise, I don't
7 think I have provided oral testimony.

8 Q. In the Honeywell case, do you
9 recall whether you considered, in formulating
10 any of your opinions, any database record of
11 customer comments?

12 A. I don't recall. I do recall
13 considering evidence related to the reasons
14 why folks were procuring the accused
15 products. I don't recall whether that was
16 provided in a database or another form.

17 Q. Have you ever provided oral
18 testimony as an expert in a case involving
19 claims of tortious interference with
20 contract?

21 A. That's, in my experience,
22 frequently plead. I would expect that I
23 have. I listed on my CV here the primary
24 cause of action, not each cause of action, so

1 I would need to investigate that further.

2 Would it be all right if I grabbed some more
3 coffee?

4 MR. COWAN: Sure. Absolutely.
5 You can stop me any time.

6 (Brief recess.)

7 Q. On page 1 of your report,
8 Section 1, the last full paragraph under
9 Section 1, you say, "I have provided expert
10 testimony regarding IP infringement damages
11 and valuation issues in federal and state
12 court proceedings." Do you see that?

13 A. Yes.

14 Q. Do you consider a Lanham Act
15 claim for damages to be included with what
16 you referred to as IP infringement damages?

17 A. I was -- technically, I suppose,
18 IP infringement is not necessarily a Lanham
19 Act, but the limitation in that sentence of
20 IP infringement damages we could remove to
21 revise that sentence to say I provided expert
22 testimony regarding damages and valuation
23 issues, which I think then would include
24 Lanham Act matters.

1 Q. Fair enough. Because I think,
2 in the course of some of the preceding
3 questions, you indicated that you had been
4 involved in cases involving Lanham Act
5 claims?

6 A. Yes.

7 Q. At least in terms of how you use
8 the phrase IP infringement damages, at least
9 how you use it, would you agree that this
10 case does not involve our case contacts,
11 meaning this case does not involve claims of
12 IP infringement?

13 MR. HANKINSON: Objection.

14 Q. Let me strike that. We may be
15 just playing semantics, but I just want to
16 make sure I understand when you use a phrase.

17 Is it fair to say that you do
18 not consider a Lanham Act false advertising
19 claim to be a claim for IP infringement
20 damages?

21 MR. HANKINSON: Objection.

22 A. My understanding is that the
23 Lanham Act broadly covers trademark matters,
24 and so we could include trademark

1 infringement. The way I think about it is
2 damages, is really that there are two major
3 categories of damages that are available in
4 most IP disputes, including Lanham Act, which
5 are lost profits and profit disgorgement.

6 And on the profit disgorgement
7 side, you've got copyright, Lanham Act, trade
8 secret cases. Those all, in my mind, fit
9 together. And then on the lost profit side,
10 you got those, plus utility patent
11 infringement, design patent. There's a
12 disgorgement remedy available. So that's the
13 way I think about it.

14 In this case, I believe there's
15 also some trade secrets that are at issue.
16 So it's a case in which there's disgorgement
17 remedies potentially available, as well as
18 lost profits.

19 Q. In terms of the -- flipping back
20 to your CV. In terms of the publications
21 that you identify, are there any publications
22 listed on page 3 flowing over to page 4 that
23 you consider to be applicable or relevant to
24 the issues in this case?

1 Tell you what, you'd probably be
2 better off using your version because that
3 staple's going to come out.

4 A. I regrettably did not bring my
5 CV.

6 Q. Okay.

7 A. "Bubbles and Squeaks:
8 'Irrational Exuberance' and Its Impact (or
9 lack thereof) on Damages Under the Lanham Act
10 in the Dot.Com Era" is an article that I
11 authored in the "Trademark Reporter" that
12 related to damages for Lanham Act under the
13 Lanham Act. That's the one I think would be
14 most applicable.

15 (Plaintiff's Exhibit No. 2
16 was marked for identification.)

17 Q. Handing you Plaintiff's
18 Exhibit 2. Does that appear to be a copy of
19 the "Bubble and Squeaks" article?

20 A. Yes.

21 Q. I'm just going to mark a couple
22 of exhibits and have you identify them. I'm
23 not going to spend a lot of time on them.

24

1 (Plaintiff's Exhibit No. 3
2 was marked for identification.)

3 Q. Is Plaintiff's Exhibit 3 the
4 engagement letter between 284 Partners and
5 KMK on behalf of ContextMedia?

6 A. Yes.

7 Q. Were you initially involved in
8 this case to consult?

9 A. That's my understanding, yes.

10 Q. And that at some point in time,
11 it was determined that you would become a
12 testifying expert?

13 A. That's generally consistent with
14 my understanding, yes.

15 (Plaintiff's Exhibit No. 4
16 was marked for identification.)

17 Q. And Plaintiff's Exhibit 4, is
18 this just copies of some communications
19 between you and counsel, along with invoices?

20 A. Could you please repeat the
21 question back, or have it read back?

22 MR. COWAN: Sue, could you read
23 it, please.

24 (The record was read by the court reporter.)

1 A. That's fair.

2 Q. Put that one away. On page 2 of
3 your report, you reference some production
4 documents that you, or at least your
5 colleagues at 284 Partners reviewed. Do you
6 see that?

7 A. Yes.

8 Q. What financial and accounting
9 records were reviewed?

10 A. There are profit and loss
11 statements that were relied upon by
12 Dr. Wilner and by me in order to determine
13 the costs associated with the services at
14 issue in this litigation. I could find some
15 Bates numbers for you, if you'd like.

16 Q. That's fine. Is that a pretty
17 good summary of what those are or were that
18 you reviewed?

19 A. That's -- it would include those
20 documents. There may be others.

21 Q. The customer databases, what
22 customer databases did you review?

23 A. Well, there was a database
24 that's been termed the CMS database, and I

1 talked a little bit about that in footnote
2 one. It relates to the practice enrollment
3 decisions and HAN's accounting of those
4 decisions.

5 Q. Any other customer databases
6 that you reviewed in this case?

7 A. That's the one that I relied
8 upon. If memory serves, there was another
9 database that was characterized as a tracking
10 spreadsheet. Those are the two that are
11 coming to mind. There may be others, again,
12 and I could flip through my report if you'd
13 like me to try to identify others that would
14 fit under that category.

15 Q. The two that you identified,
16 those were HAN produced documents, correct?

17 A. Yes.

18 Q. Did you review any ContextMedia
19 databases, customer databases?

20 A. I don't recall reviewing any
21 ContextMedia databases.

22 Q. Do you know if anybody else at
23 284 Partners did?

24 A. Not to my knowledge. I provided

1 a complete listing of the Bates numbers of
2 documents that I reviewed in connection with
3 this report, and I believe it's in appendix
4 or exhibit -- I could find that for you. And
5 to be sure, we could reference that.

6 Q. Why don't we just pull it out,
7 because there's an Appendix B.

8 A. That's what I had in mind.

9 Q. What is Appendix B, at least as
10 you would describe it?

11 A. This is a document index that
12 relates to -- I wanted to provide a
13 disclosure of the documents that I reviewed
14 and relied upon for the purposes of writing
15 my report.

16 Q. In terms of marketing materials,
17 what marketing materials do you recall
18 reviewing?

19 A. I'm recalling collateral related
20 to the products at issue.

21 Q. Would that be Context
22 collateral?

23 A. I reviewed information about
24 both products in order to try to understand

1 the nature of the products that were at issue
2 in the case.

3 Q. And part of my confusion is I
4 want to make sure I understand Appendix B,
5 because Appendix B, as I read it, just
6 identifies HAN produced documents.

7 A. If you'd look to the next page
8 there. I've got a listing of Context
9 documents.

10 Q. Got it. All right.

11 A. And then if you'd flip to the
12 last page beyond that, I've got deposition
13 transcripts, and the exhibits associated with
14 those depositions.

15 Q. Exactly. Thanks.

16 A. And also I've got -- if you flip
17 to the next page, there's some other
18 references, some publicly available
19 information.

20 Q. So if you'd look at the page
21 that has some ContextMedia documents, it
22 says, "ContextMedia database 2012-member DB."
23 Do you know what that is?

24 A. If memory serves, that related

1 to the nature of practices that were
2 converted from ContextMedia to HAN -- excuse
3 me. From HAN to ContextMedia, and that there
4 was some differences between HAN's accounting
5 of those practices and its CMS database, and
6 ContextMedia's accounting of those.

7 And for purposes of my report, I
8 relied upon HAN's accounting of those because
9 that was the database that Dr. Wilner relied
10 upon, and I wanted to try to use a similar
11 framework for purposes of my analysis so that
12 we were on the same page.

13 Q. Why do you say that Dr. Wilner
14 relied upon that database, the HAN database?

15 A. Because if memory serves, his
16 report indicates that he did so, and that's
17 consistent with my understanding.

18 Q. Do you have a copy of his
19 report?

20 A. Yes. And I have reference in
21 footnote one, page 7 of Dr. Wilner's report,
22 where he's referencing those same documents.

23 Q. Could you go ahead and just
24 describe for me in his report where he

1 references that and how so?

2 A. I refer you to page 7 of his
3 report, footnotes 13 and 14.

4 Q. Go ahead.

5 A. Do you want me to read them, or
6 do you just want to --

7 Q. Yes, just read them.

8 A. He says, "My understanding is
9 that PatientPoint uses the information it
10 collects to assign standard reason codes to
11 practices that left PatientPoint, and
12 includes those reason codes in preparing
13 periodic analyses of terms and practices.
14 For term metrics prepared by PatientPoint,
15 see HAN 004743 to 46, HAN 006135, HAN 005747,
16 HAN 006138.

17 "It's my understanding that
18 ContextMedia has a different list of
19 physician practices that converted from
20 PatientPoint to ContextMedia.

21 "I also understand the parties
22 to the suit could in the future stipulate to
23 the practices that convert it. As a result,
24 I reserve my right to update the list of

1 practices in the future. This update would
2 not alter my overall methodology, only the
3 imports."

4 Q. Is it your understanding that
5 Dr. Wilner relied upon any of the customer
6 comments in the HAN database in formulating
7 any of his opinions?

8 MR. HANKINSON: Objection.

9 A. My understanding is that he did.

10 Q. Go ahead. What's the basis for
11 that?

12 A. In order -- well, that's my
13 understanding of how he defined the universe,
14 so to speak, of practices that converted from
15 HAN to ContextMedia, and that forms the basis
16 of his calculation of lost profits and unjust
17 enrichment damages in part.

18 Q. Do you draw any distinction
19 between trying to determine which practices
20 simply switched from HAN to Context, and
21 trying to determine why they did?

22 A. I don't understand the question
23 that you're asking me.

24 Q. Do you understand that the

1 parties have attempted to come up with a list
2 of practices that we all agree switched from
3 HAN to Context?

4 A. I understand that the parties
5 have differing views about that. I don't
6 know the degree to which the parties have
7 come together to try to reach an accord about
8 that.

9 Q. Okay. And so what I'm trying to
10 understand is in your mind, is there a
11 distinction between trying to determine just
12 the number of practices that switched, and
13 trying to determine the reasons why the
14 practices switched?

15 A. For what purpose?

16 Q. For any purpose.

17 MR. HANKINSON: Objection to
18 form.

19 A. I don't understand the question
20 that you're asking me.

21 Q. So you don't understand there to
22 be a distinction between trying to come up
23 with a number of practices that switched and
24 worked on to try to determine why they may

1 have switched?

2 A. I understand that there's
3 practices that switched, and then there are
4 reasons why those practices switched, and
5 that's part of the issue that we're
6 navigating in this case.

7 Q. And do you know whether
8 Dr. Wilner relied upon any of the commentary
9 in the HAN database regarding reasons for --
10 reasons given by practices as to switching
11 and formulating any of his opinions?

12 MR. HANKINSON: Objection.

13 A. He has referenced those comments
14 in his reports, so I do think he's considered
15 those, yes.

16 Q. Where did he reference those in
17 his report?

18 A. Do you have his second report
19 here?

20 Q. Oh, his secondary report?

21 A. Yes.

22 Q. Well, your report only
23 considered his initial report?

24 A. My report was exchanged

1 subsequent to his first report but before his
2 second report.

3 Q. Right. So in terms of his first
4 report, did he reference considering any of
5 the comments in a database?

6 A. I'd have to flip through his
7 reporting, and I haven't committed it to
8 memory.

9 Q. Okay. In terms of customer
10 correspondence, back on page 2 of your
11 report -- so you can put Dr. Wilner's report
12 away for a moment.

13 Going back to your report,
14 customer correspondence, what customer
15 correspondence was referred to?

16 A. I recall, in the record of this
17 case, that there were -- there was evidence
18 related to communications with practices.

19 Q. Did you review any
20 correspondence, e-mails or letters, between
21 Context and any HAN practices?

22 A. My research, there were
23 deposition exhibits that related to that.

24 Q. Do you recall any of those being

1 important to the formation of any of your
2 opinions?

3 MR. HANKINSON: Objection.
4 Form.

5 A. Importance is on a continuum. I
6 think we would need to know relative to what.
7 I thought they were part of the record in the
8 case that I was interested in reviewing, and
9 I did so.

10 They didn't form an input from a
11 quantitative or arithmetic sense into a
12 calculation of profits, but they may be of
13 relevance to a determination of the portion
14 of profits that may be attributable to the
15 alleged wrongful conduct.

16 Q. On page 3 of your report, you
17 reference discussions you had with Mr. Demas,
18 Mr. Garms, and Mr. Postel from Context. Do
19 you see that?

20 A. Yes.

21 Q. Are all of your discussions with
22 those three gentlemen reflected in your
23 report?

24 A. I provided footnote references

1 for -- in sentences or areas of their report
2 where I relied in part on Mr. Demas,
3 Mr. Garms, and Mr. Postel.

4 So I did attempt to provide a
5 full disclosure of the substance of those
6 conversations insofar as my opinion and
7 report contained here in Exhibit 1.

8 Q. Was there anything that they
9 told you that did not find its way into your
10 report?

11 A. I can imagine that there was. I
12 spoke with Mr. Demas perhaps three or four
13 times, and I'm not recalling anything in
14 particular, but part of what I wanted to do
15 is understand a little bit about the history
16 of the company, the products at issue, the
17 nature of the dispute, and there were other
18 sources of information that was consistent
19 with what Mr. Demas told me.

20 And it's my typical practice to,
21 if there are a couple sources of information,
22 to cite several of them, not necessarily all
23 of them. I wasn't trying to provide here an
24 exhaustive list of every source for every

1 sentence, so -- but I do think I could --
2 that Mr. Demas in particular, our
3 conversations extended beyond just what
4 footnotes may indicate in the report.

5 Q. Did you take notes of your
6 communications with Mr. Demas?

7 A. No.

8 Q. In formulating your opinions in
9 this case, did you make any assumptions as to
10 whether Context made literally false
11 statements to any HAN practices?

12 A. I made the assumption that
13 liability would be found in HAN's favor for
14 all of HAN's claims.

15 Q. And why did you do that?

16 A. That is the standard practice of
17 my peers who evaluate damages in the context
18 of commercial litigation. One of the
19 predicate assumptions that ought to be made
20 in connection with the damages report is that
21 liability will be found.

22 Q. In formulating your opinions in
23 this case, did you make any assumptions as to
24 whether Context willfully made any literally

1 false statements?

2 MR. HANKINSON: Objection.

3 A. I did not make the assumption
4 that -- related to willfulness.

5 Q. Did you make any assumptions
6 relating to bad faith?

7 MR. HANKINSON: Objection.

8 A. I think I need to take a step
9 back on the willfulness response, as well as
10 bad faith, which is I'm not a legal scholar
11 or expert, and I don't know what are the
12 predicate proofs that need to be made in
13 order to prevail on the various claims that
14 have been asserted by HAN in this case, my --
15 sort of my analysis, with a top level
16 assumption of liability. And that's really
17 what I assumed.

18 It may be that HAN is pursuing
19 exceptional damages or non-monetary damages.
20 That's really beyond the scope of the opinion
21 that I'm rendering. Is that responsive to
22 your question?

23 Q. It is. But leaving aside any
24 claim for punitive damages, exemplary

1 damages, and leaving aside any claim for
2 non-monetary damages, conjunctive relief, did
3 you make any assumptions as to whether any
4 statements made by Context to HAN practices
5 were literally false and made willfully?

6 MR. HANKINSON: Objection.

7 A. Let me answer this in the same
8 way as I did before, which is I made the
9 assumption that liability would be found. I
10 did not try to tread into willfulness related
11 issues as it relates to non-monetary damages.

12 If willfulness is part of one of
13 the proofs that needs to be made in order to
14 prevail on liability for the other causes of
15 action, then I did insofar as I assumed
16 liability. But I didn't want to weigh in on
17 the equitable side or the non-monetary side
18 of the damages related questions or liability
19 issues.

20 Q. On page 5 and 6 of your report,
21 you reference Johnson & Johnson's branding
22 agency J3. Do you see that?

23 A. I do.

24 Q. Are you aware of any evidence

1 that Context, specifically Mr. Shah, misled
2 J3?

3 A. I'm not aware one way or the
4 other.

5 Q. If the evidence were to show
6 that Mr. Shah misled J3, specifically as it
7 relates to HAN, would that be something that
8 you would want to know in formulating your
9 opinions?

10 MR. HANKINSON: Objection.

11 A. To the extent that HAN seeks
12 damages related to additional elements,
13 that's something I would expect to review and
14 assess. Your question isn't defined well
15 enough for me to know whether or not that's
16 something that's forthcoming, and so if it
17 is, I would expect to assess it if asked to
18 do so.

19 Q. On page 6, the last full
20 paragraph prior to Section 5, you say, "In
21 instances where a practice using an existing
22 competitive offering preferred ContextMedia's
23 platform on its merits, I understand that
24 ContextMedia offered the practice the option

1 of a hassle-free switch-out." Do you see
2 that?

3 A. Yes.

4 Q. Tell me, as best as you
5 understand, the hassle-free switch-out. What
6 was that?

7 A. Well, I would refer you to
8 Mr. Shah's testimony. He testified about
9 that, and I included references in my report.
10 I brought that with me, if you'd like. But
11 my understanding is that is contained in that
12 sentence that you just -- or the paragraph
13 that you just referred me to, which is that
14 ContextMedia made efforts to work with
15 practices to schedule switch-outs in ways
16 that would be convenient for the practice,
17 such as scheduling those switch-outs when
18 patients wouldn't be there, outside of the
19 normal bounds of office hours, and things of
20 that nature.

21 Q. Was there anything about the
22 hassle-free switch-out, including any of the
23 documents that are part of the hassle-free
24 switch-out utilized by Context, that was

1 material to you in terms of rendering your
2 opinions regarding damages on the tortious
3 interference claim?

4 MR. HANKINSON: Objection.

5 A. I understand that HAN alleges
6 that certain of the practices related to
7 hassle-free switch-outs constituted alleged
8 wrongful conduct. So I understand that, and
9 it has relevance in that way.

10 But there also was testimony
11 about hassle-free switch-outs related to
12 the -- trying to accommodate the practice as
13 I just discussed, and Mr. Shah's associated
14 testimony that I think also has problems.

15 Q. Let me hand you what's
16 previously been marked in the case as
17 Plaintiff's Exhibit 79, and ask you if that's
18 a document that you recall having seen in
19 connection with your work in this case?

20 A. I don't recall this specific
21 document, but I do see that it's listed as an
22 exhibit, I believe to Ms. Agarwal's
23 deposition, in which case I do believe I did
24 see this at some point.

1 Q. In your report on page 6, the
2 next sentence, you say, "I understand that
3 the intent of this offering --" and I think
4 you were referring to the hassle-free
5 switch-out package -- "was to eliminate any
6 concerns such a practice may have had
7 regarding the time commitment to set up a new
8 product, and to accommodate that practice's
9 schedule so as not to disrupt the waiting
10 room area." Do you see that?

11 A. Yes.

12 Q. So I take it that, at least it
13 was important to you, in connection with
14 formulating your opinions, the intent behind
15 the hassle-free switch-out practice?

16 MR. HANKINSON: Objection.

17 A. Really, this is in the
18 background section of my report, and what I
19 was trying to do was provide some context for
20 my opinion, you know, which is the reason why
21 I included this element. It does have
22 relevance to consider, I think, and I did so.

23 Q. Would you agree with me that
24 Plaintiff's Exhibit 79 would indicate that

1 there was a different intent on the part of
2 Context in formulating the hassle-free
3 switch-out?

4 MR. HANKINSON: Objection.

5 A. I would deter this question to
6 the fact witnesses in the case. That's not
7 something that I'm -- I have personal
8 knowledge of. I believe Mr. Shah and perhaps
9 Ms. Agarwal's testified about the hassle-free
10 switch-outs, and I included that, references
11 to that testimony in my report.

12 Q. Well, let me ask you about that,
13 then. Do you not consider other evidence?
14 Do you simply rely upon what your client
15 testified?

16 A. I thought you were asking me a
17 question of fact, and no, I do consider
18 evidence. Perhaps I misunderstood your
19 earlier question.

20 Q. Right. So you would consider
21 what your client testified to on a particular
22 fact, correct?

23 A. I would consider testimony from
24 both parties, sure.

1 Q. And you would consider as well
2 evidence from your client that contradicts
3 what they testified to; would you not?

4 A. I would consider all the
5 evidence that was made available to me in
6 order to reach my opinions.

7 Q. Well, you read Ms. Agarwal's
8 transcript, you've looked at the exhibits.
9 Exhibit 79 was an exhibit. Did that cast any
10 doubt in your mind on the intent of
11 ContextMedia in formulating the hassle-free
12 switch-out practice?

13 MR. HANKINSON: Objection.

14 A. I didn't really render opinions
15 about the intent of the hassle-free
16 switch-out. I just considered that in the
17 context of the overall case.

18 Q. In this case, would the intent
19 behind the hassle-free switch-out package
20 have any relation to causation?

21 A. Causation to damages?

22 Q. Correct.

23 A. I think there's other evidence
24 in the case that I put more weight on with

1 respect to causation than hassle-free
2 switch-outs. I would characterize that as
3 something that potentially could have an
4 impact on causation of damages, but in light
5 of the balance of testimony and evidence
6 available in this case, I don't think it has
7 much weight.

8 Q. If the evidence shows that
9 Context developed and utilized the
10 hassle-free switch-out package in order to
11 keep HAN practices from abiding by and
12 following their contracts with HAN, would
13 that be significant to you in formulating
14 your opinions?

15 A. Could you please repeat that
16 question.

17 MR. COWAN: Yes. Sue, read it
18 back.

19 (The record was read by the court reporter.)

20 MR. HANKINSON: Objection.

21 A. I started my analysis with an
22 assumption that liability would be found.
23 And I understand that this is what is part of
24 HAN's claim in this case is that those

1 practices that were converted constitute a
2 form of alleged unlawful conduct.

3 And so I don't think the
4 evidence that you just suggested would have a
5 major impact on the framework or my
6 understanding of damages related issues in
7 this case.

8 Q. Is it your understanding that
9 Context would not switch a HAN practice until
10 it had received a signed authorization form
11 which is part of the hassle-free switch-out
12 practice?

13 MR. HANKINSON: Objection.

14 A. Can you please repeat that
15 question.

16 MR. COWAN: Sure. Sue, read it
17 back.

18 (The record was read by the court reporter.)

19 THE WITNESS: One more time.
20 I'm sorry.

21 (The record was read by the court reporter.)

22 A. I would defer to the fact
23 witnesses. I don't have an understanding of
24 that. I've made the assumption, for purposes

1 of my report, that each of the practices that
2 were converted from HAN to ContextMedia did
3 so a month before, at least, they otherwise
4 would have.

5 So I think there is an implicit
6 assumption within my report that gets to, in
7 some respect, that type of a liability
8 question, but I don't have an independent
9 opinion about whether or not that happened.

10 And I think that the fact witnesses would be
11 in a better position to answer that question.

12 Q. Does that issue not go to
13 causation in your mind?

14 MR. HANKINSON: Objection.
15 Form.

16 A. Can you please help me
17 understand what you mean by "that issue," and
18 can you --

19 Q. The fact that Context witnesses,
20 including its corporate rep, have stated that
21 each and every practice that switched from
22 Context to HAN had to sign an authorization
23 form before Context would move forward with
24 the switch.

1 A. Just so we're speaking the same
2 language. When I think about causation, I'm
3 thinking about causation to damages, not
4 causation from a liability perspective. And
5 no, I don't think that would impact causation
6 to damages.

7 Q. Why not?

8 A. Well, I wrote a report that
9 contains the substance of my opinions with
10 respect to causation, and it's a multifaceted
11 and long answer. Would you like me to
12 explain that in detail?

13 Q. In the context of my question,
14 which goes to the authorization form.

15 MR. HANKINSON: Objection.

16 A. I'd refer you to page 17 in my
17 report, where I have a bulleted list here of
18 items that I think are relevant to causation.

19 And the evidence in this case
20 demonstrates that there are a myriad of
21 factors that practices weighed when making
22 enrollment decisions, or differences in the
23 product offerings between ContextMedia and
24 HAN.

1 I'm not aware of evidence that
2 would substantiate the claim that practice
3 conversion decisions were attributable to the
4 alleged wrongful conduct. There's a lot of
5 evidence that other factors were driving
6 those enrollment decisions.

7 Q. If the evidence shows that
8 Context would not have switched any HAN
9 practices but for the execution of an
10 authorization form that was included as part
11 of the hassle-free switch-out practice, does
12 that or would that impact your opinions and
13 conclusions?

14 MR. HANKINSON: Objection.

15 A. I want to understand this
16 hypothetical. The hypothetical is if I
17 assumed that but for -- can you just repeat
18 the hypothetical for me, please?

19 Q. Yes. I don't believe it's a
20 hypothetical. I'm just saying --

21 MR. COWAN: Go ahead and read it
22 back, Sue.

23 (The record was read by the court reporter.)

24 THE WITNESS: One more time,

1 please.

2 (The record was read by the court reporter.)

3 A. I'm not aware of evidence that
4 corroborates the claim that but for the
5 alleged wrongful conduct, HAN would have
6 suffered lost profits in excess of those
7 quantified in my report. I think that's on
8 the basis of the evidence that's available in
9 this case.

10 There are a lot of reasons to
11 conclude that causation has not been
12 established, and if there is additional
13 evidence relevant to causation that
14 Dr. Wilner or HAN's experts identified, I
15 expect I would review that and assess it.

16 Q. That's not my question. My
17 question is, if the evidence demonstrates
18 that Context would not have switched any HAN
19 practices but for their receipt of an
20 executed authorization form, would that
21 impact your opinions and conclusions in the
22 case?

23 MR. HANKINSON: Objection.

24 A. I believe it's the same answer

1 as the one that I just gave you. Could you
2 perhaps rephrase it, then?

3 Q. It's fair to say that your
4 report talks considerably about but-for
5 causation; does it not?

6 A. It does.

7 Q. And my question is simply this:
8 If but for the execution of the authorization
9 form included in the hassle-free switch-out
10 practice, the HAN practices would not have
11 switched to Context, does that impact your
12 opinions and conclusions in the case?

13 MR. HANKINSON: Objection.

14 A. My opinion is that but-for
15 causation has not been established. Your
16 question is hypothetical insofar as you're
17 asking to assume if but-for causation is
18 established, does that establish but-for
19 causation.

20 And I suppose under a
21 hypothetical that but-for causation is
22 established, then I would agree that it is.
23 But what I'm saying is I don't think that the
24 second part of your question changes the

1 balance of evidence in this case about the
2 reasons why practices made enrollment
3 decisions. I think that ought to be properly
4 considered, along with the testimony and the
5 other evidence that I included in my report.

6 Q. Did you consider, in the context
7 of your conclusions regarding but-for
8 causation, whether the practices would have
9 switched but for the execution of an
10 authorization form included in the
11 hassle-free package provided to them by
12 Context?

13 MR. HANKINSON: Objection.

14 A. My understanding of the alleged
15 wrongful conduct is as I indicated in pages 6
16 and 7 of my report. Generally, HAN claims
17 ContextMedia adopted a strategy of making
18 false and/or misleading statements to HAN's
19 existing customers regarding those practices,
20 existing contracts with HAN and HAN's
21 business services. And I included some
22 examples here.

23 I did not include that specific
24 provision that you asked me about in your

1 question, though it is, I think, not
2 inconsistent with my understanding of what
3 generally are the allegations in the case.

4 Q. My question, then, is -- and
5 maybe it was a question to ask, but I'll ask
6 it, perhaps rephrase it.

7 Did you consider that issue in
8 formulating your opinions and conclusions, by
9 "that issue," the issue of whether but for
10 the execution of an authorization form by the
11 HAN practice, the practice would not have
12 switched to Context?

13 A. Yes.

14 MR. HANKINSON: Objection.

15 Q. Where is that referenced?

16 A. It's referenced in the section
17 related to but-for causation, beginning in
18 Section 7, and continuing through the balance
19 of the report.

20 Q. Well, just point me, if you
21 would, sir, to where you specifically discuss
22 but-for causation and the authorization form
23 signed by each and every of the practices.

24 A. I discuss but-for causation with

1 respect to the evidence that was advanced by
2 Dr. Wilner. I didn't granularly get down to
3 that level of detail that you're asking me
4 about, but I considered but-for causation
5 with respect to the conversion of practices
6 generally, including the alleged wrongful
7 conduct, as well as the other factors that
8 drove customer purchase decisions.

9 If we reach a point where we
10 could take a break?

11 Q. Sure. Let me just ask one more
12 question and we will.

13 A. Sure.

14 Q. If a practice would not have
15 switched to Context, but for its execution of
16 the authorization form, would that fact
17 impact your opinions and conclusions in this
18 case?

19 MR. HANKINSON: Objection.

20 A. The way that I think about this
21 case is that if there are -- if there's
22 evidence that's available that would lead one
23 to conclude that a particular practice would
24 not have switched but for the alleged

1 wrongful conduct, and that's something that
2 ought to be considered, I'm not aware of
3 evidence that would substantiate Dr. Wilner's
4 claim.

5 In fact, as I understand it,
6 Dr. Wilner has relied on industry experts, or
7 so-called industry experts that -- whose
8 opinions have not been disclosed to me, at
9 least the analyses that they performed have
10 not been disclosed to me.

11 But if there's additional
12 evidence that's relevant to the determination
13 of practice enrollment decisions, then I
14 would want to consider that, sure.

15 MR. COWAN: All right. That's a
16 good time for a break.

17 (Brief recess.)

18 Q. Are you aware of any presumption
19 in this case that Context statements to HAN
20 practices caused damage to HAN?

21 A. Could you please repeat that?

22 Q. Sure. Just repeat it or
23 rephrase it?

24 A. I was just not quite with us.

1 Q. Got it. Are you aware of any
2 presumption in this case that Context
3 statements to HAN practices caused damage to
4 HAN?

5 A. The word presumption is a little
6 bit confusing to me. Could you please
7 re-characterize or rephrase that sentence?

8 Q. I don't know that I can. If --

9 A. I'll answer as best I can.

10 Q. Sure.

11 A. Dr. Wilner has presumed that the
12 alleged wrongful conduct caused damages, and
13 he's projected those damages through 2018. I
14 disagree that the profits generated by
15 ContextMedia or HAN, or those profits lost by
16 HAN are attributable to the alleged wrongful
17 conduct, with the possible exception of
18 revenue and profits that were lost by HAN
19 associated with practices that converted
20 before they otherwise would have. And so
21 that's -- is that responsive to your
22 question?

23 Q. It's your answer, so I'll take
24 that. And my question, let me ask it maybe

1 in a slightly different way. Are you aware
2 of any legal presumption in this case that
3 Context statements to the HAN practices
4 caused HAN damages?

5 A. I did not make the assumption
6 that HAN would be entitled to damages upon a
7 finding of liability. I evaluated the
8 evidence in this case in order to provide an
9 opinion about whether and to what extent HAN
10 should be entitled to damages upon the
11 finding of liability. And I offered opinions
12 about those damages in this report.

13 Q. The cases in your binder, the
14 law cases, the legal cases, where did you get
15 those?

16 A. They were -- some of the cases I
17 was aware of based on my work and experience
18 in this field; some of the cases were
19 provided by counsel.

20 Q. Which were you aware of, which
21 were provided by counsel?

22 A. I think the way that I would
23 answer this question most clearly for you is
24 that there was a quote related to post hoc

1 ergo propter hoc on page 10 of my report that
2 references a case, TNS Media Research, LLC.

3 That was an opinion about an
4 expert that was working in another case that
5 I was working on. So I was aware of that,
6 and some of the cases cited by that case.

7 I asked Mr. Hankinson whether
8 there were other cases relevant to this issue
9 in the venue that this litigation is in, and
10 those types of cases were provided.

11 Q. So, for example, the Balance
12 Dynamics case and the Iams cases that were
13 referenced in your report, were those
14 provided to you by counsel?

15 A. Do you have a reference point?

16 Q. Sure. Page 8 of your report,
17 the footnotes cite those cases.

18 A. If memory serves, yes, those
19 were provided by counsel.

20 Q. Is there anything about any of
21 those cases that were provided to you by
22 counsel that, in your mind, as you sit here
23 today, was important to your overall
24 opinions?

1 MR. HANKINSON: Objection.

2 A. Generally, I wanted to make sure
3 that my opinions were consistent with the
4 law. I have a lot of experience working in
5 matters involving these measures of monetary
6 relief, and I have a general understanding
7 based on that experience.

8 And I wanted to confirm my
9 understanding by reference to these cases,
10 and that's what I did, so it was important in
11 that respect.

12 Q. On page 9 of your report, right
13 above Section 7, you talk about a couple of
14 the other claims. Do you see that?

15 A. I'm not sure which part you're
16 referencing.

17 Q. Right above where you say "I
18 also understand that several forms of
19 relief --" that paragraph.

20 A. Yes.

21 Q. I didn't see any reference in
22 there to the tortious interference with
23 contract claim. Is that fair?

24 A. I don't know whether that's

1 fair. I've identified some of the actions
2 that I understand may be related to alleged
3 tortious interference on page 6 of my report,
4 and I don't know whether that alleged
5 tortious interference relates to the
6 deceptive trade practices, or if that's
7 something different.

8 Generally, my understanding is
9 that there were two forms of relief that were
10 sought by HAN, lost profits and profits
11 disgorgement. I have a general understanding
12 that under the various claims that HAN has
13 made, that those are measures that are
14 potentially available.

15 And then sorting out as to
16 between which claim relates to which
17 methodology is something that I didn't really
18 attempt to do in this report.

19 Q. On page 10, right above the
20 footnote, the sentence in the last full
21 paragraph on that page, you say, "In my
22 experience, plaintiffs often attempt to
23 satisfy the test for but-for causation by
24 demonstrating a nexus between the alleged

1 wrongful conduct and demand for the alleged
2 lost sales; causation of the alleged lost
3 sales by showing the absence of acceptable
4 alternatives, or by showing the plaintiffs
5 but-for market share; plaintiffs capacity to
6 exploit the demand; and the amount of profit
7 that would have been made." Do you see that?

8 A. Yes.

9 Q. Is that your experience in
10 Lanham Act cases involving claims of false
11 advertising?

12 A. That's my experience generally
13 related to lost profits, whether it's a
14 breach of contract, a claim of lost profits
15 under Lanham Act, a claim of lost profits
16 under 35 USC 284.

17 Generally, what I'm talking
18 about here is elements associated with
19 establishing causation to actual lost
20 profits.

21 Q. Turn to page 16 of your report,
22 if you would.

23 A. (Complies with request.)

24 Q. Up at the top, you have a quote

1 from the "Litigation Services Handbook: The
2 Role of the Financial Expert." Do you see
3 that?

4 A. Yes.

5 Q. And you indicate from the
6 chapter about patent infringement damages.
7 Do you see that?

8 A. Yes.

9 Q. Was there anything in that book
10 concerning Lanham Act false advertising
11 damages?

12 MR. HANKINSON: Objection.

13 A. I expect there would be, yes.

14 Q. Is there a reason why you chose
15 to quote something about patent infringement
16 damages, as opposed to Lanham Act damages?

17 A. Yeah. In my experience, there's
18 just a lot more opinions related to patent
19 infringement litigation than Lanham Act
20 damages related opinions.

21 What I was focused on here was
22 causation element, which I think, as I just
23 indicated a moment ago, in my opinion, was
24 relevant to lost profits claims generally, so

1 that's why I selected that passage.

2 Q. Have you ever been involved in a
3 matter, either as a consultant or as a
4 testifying expert, involving Lanham Act false
5 advertising claims, involving literally false
6 statements where there was a legal
7 presumption that the statements caused
8 damages?

9 A. I don't recall any such
10 instance.

11 Q. If you could turn to page 18 of
12 your report?

13 A. Yes.

14 Q. Under Section A, you've
15 identified a number of factors that impact
16 the point of care health media enrollment
17 decisions of HAN's former and current
18 practices. Do you see those?

19 A. Yes.

20 Q. First question is, are those
21 listed in any sort of rank order, order of
22 priority?

23 A. There were some rankings that
24 were -- that some of the witnesses in the

1 case provided. I don't recall -- I didn't
2 attempt to line this up precisely with that
3 ranking. Some of the rankings were made
4 available by just the nature of the questions
5 and answers that were asked in the
6 depositions.

7 And so I wasn't intending this
8 to be from top to bottom most important to
9 least important, but there is some evidence
10 in the record that we could begin to navigate
11 that if we so choose.

12 Q. As you sit here today, when you
13 look at the factors that you bulleted on
14 pages 18 and 19, can you give me an idea of
15 what you'd consider to be the three or four
16 most important factors?

17 A. The evidence in this case
18 indicates that that varied to some degree on
19 a practice by practice basis. There appears
20 to be a consensus between the parties that
21 the quality of the health related programming
22 and the entertainment related programming in
23 terms of its ability to engage the patient
24 was important, as well as the length of the

1 program.

2 I recall seeing testimony about
3 technical service issues, and some of the
4 trouble that HAN was experiencing. Those are
5 some that, along with media format, the
6 testimony indicates were relatively
7 important.

8 Q. If HAN practices were told by
9 Context that a significant number of HAN
10 practices were switching to Context, would
11 that relate to the quality of health related
12 programming?

13 A. I'm sorry. You lost me on that
14 question. Can you please restate?

15 Q. Sure. If HAN practices were
16 told by Context that a significant number of
17 HAN practices had switched to Context, would
18 that relate to the quality of health related
19 programming?

20 A. No. I was really thinking about
21 statements made to practices, and the
22 relationships for sales representatives
23 bullets, which is on the next page. When I
24 was thinking about the quality related

1 programming, and the entertainment related
2 programming, and the media format, for
3 example, I was just talking more about the
4 product.

5 Q. And would a statement that a
6 significant number of practices had switched
7 their product from HAN to Context relate to
8 the quality of the product?

9 MR. HANKINSON: Objection.

10 A. That may be a byproduct of the
11 quality of the product. I think it would
12 just depend on -- I think it would depend.

13 Q. Is the HAN product that was in
14 HAN practice waiting rooms during the
15 relevant time period, 2011 to March of 2013,
16 or April of 2013, was that product a
17 PowerPoint slideshow?

18 MR. HANKINSON: Objection.

19 A. I understand that there's
20 allegations that are made that that -- claims
21 of it being a PowerPoint slideshow constitute
22 alleged wrongful conduct. I'm not trying to
23 weigh in and offer an opinion about whether
24 that was or was not.

1 I did notice that there was some
2 deposition testimony from some of the
3 witnesses, and also there were some comments
4 in the CMS database that some of the
5 customers characterized it that way perhaps
6 in some instances, but I'm not trying to wade
7 in to the liability side of this case.

8 Q. And you have listed, down at the
9 last bullet on page 18, the ratio of health
10 related content to advertising. Do you see
11 that?

12 A. Yes.

13 Q. So that's an important factor to
14 practices?

15 A. I understand that the -- from
16 the testimony of witnesses is that that was a
17 factor that had some importance, yes.

18 Q. Turn to page 29, if you would.

19 A. I'm with you.

20 Q. The bullet points that are
21 listed there, do you see those?

22 A. Yes.

23 Q. Are you able to testify that any
24 HAN practice left because of any of those

1 reasons?

2 A. The evidence in this case
3 supports that conclusion, yes.

4 Q. And "the evidence in this case"
5 being what is referred to in the CMS
6 database?

7 A. The CMS database, the deposition
8 testimony of the witnesses in this case, and
9 some of the documents that were also made
10 available, yes.

11 Q. But do you know for a fact
12 whether any HAN practice left for any of
13 these reasons?

14 A. On the basis of the evidence
15 that's been made available that's contained
16 in my report, that's the conclusion that I
17 think is supportable. I don't have personal
18 knowledge of it. My knowledge is based on
19 the evidence that's articulated in this
20 report.

21 Q. Do you have an opinion as to
22 whether any Context employee lied to a HAN
23 practice?

24 A. I don't have opinions one way or

1 the other about that.

2 Q. And that's not important to any
3 of your opinions or conclusions in the case?

4 A. Well, I understand, again, that
5 there are allegations that have been made by
6 HAN that ContextMedia lied and/or made false
7 statements, and that's part of the predicate
8 assumption that I made in order to evaluate
9 damages is that there will be a finding of
10 liability for the wrongful conduct that's
11 been alleged by HAN.

12 Q. As you looked through all of the
13 exhibits, deposition exhibits in this case,
14 and read the testimony, did you formulate,
15 did you come to any conclusion in your own
16 mind whether or not Context lied to the
17 practices?

18 A. That's not something I spent
19 much time focusing on.

20 Q. Do you have an opinion as to
21 whether any of the provisions in HAN's
22 enrollment agreement of its practices are
23 enforceable?

24 A. No opinions about that.

1 (Plaintiff's Exhibit No. 5
2 was marked for identification.)

3 Q. Handing you what's been marked
4 as Plaintiff's Exhibit 5. Take a minute and
5 look at that. I don't know that this is a
6 document that you reviewed, a document that
7 was produced by Context.

8 A. (After reviewing document) Okay.

9 Q. On the first page, there's an
10 e-mail from a practice to Deven Tatum,
11 January 3, 2012, where the practice person says,
12 "I am not at my desk; however, I will need to
13 pull my enrollment agreement with Healthy
14 Advice. Are you aware of what is necessary
15 on my end with regards to notifying HA --"
16 who we assume to be Healthy Advice -- "of any
17 decision to discontinue their services." Do
18 you see that?

19 A. Yes.

20 Q. And Deven responds, "Yes, ma'am.
21 No --" no is in all caps -- "action is required
22 by you. Simply fill out the attached forms
23 and we do the rest." Do you see that?

24 A. Yes.

1 Q. Does a statement like this, made
2 by Context to a practice, specifically
3 referencing the practice's obligation under
4 HAN's contract, have any relevance to
5 causation issues in your mind?

6 MR. HANKINSON: Objection.

7 A. In my mind, the right question
8 to ask is but for the alleged wrongful
9 conduct, what would have happened to this
10 practice.

11 And in order to evaluate that, I
12 do think we can consider this document, along
13 with the other evidence I reference in my
14 report, and -- in order to make a
15 determination.

16 Q. So if a practice asks a Context
17 representative what do I need to do under my
18 agreement with HAN before cancelling, and the
19 practice is told something by the Context
20 person that is not true, is that impactful
21 with respect to any causation issues?

22 MR. HANKINSON: Objection.

23 A. It depends on whether or not HAN
24 would have realized incremental sales and

1 profits but for the alleged wrongful conduct.

2 Q. And you don't know whether, in
3 this particular case, that would or would not
4 have happened?

5 A. Well, I've assumed in my report
6 that this type of exchange would constitute
7 alleged wrongful conduct. I've quantified
8 profits associated with that that were
9 allegedly lost by HAN, and so I have
10 considered this with respect to causation.

11 Q. And do you know what would have
12 happened in this particular case if
13 Ms. Tatum had responded yes, you need to give
14 HAN advanced written notice of your intent to
15 cancel under the agreement?

16 MR. HANKINSON: Objection.
17 Form.

18 A. There is evidence available in
19 this case from which we can form conclusions
20 about what would have happened absent the
21 alleged wrongful conduct. And I wrote an
22 opinion about that, and it's contained in
23 Exhibit 1, yes.

24 Q. Exhibit 1 of your report?

1 A. Right.

2 Q. And my question is, with respect
3 to this practice, do you know what would have
4 happened had the practice been told you need
5 to give HAN advanced written notice of your
6 intent to cancel?

7 MR. HANKINSON: Objection.

8 A. Based on the evidence available
9 in this case, it's my conclusion that it's
10 reasonable to conclude that HAN may have
11 realized incremental sales and profits to the
12 extent that the practice, from Exhibit 5,
13 converted to ContextMedia before it otherwise
14 should have.

15 On the basis of the evidence in
16 my report, I also think it's unreasonable to
17 conclude that the practice would have stayed
18 with ContextMedia through 2018. And I
19 provide evidence associated with, or the
20 bases of those opinions in my report.

21 MR. HANKINSON: For clarity, do
22 you mind if I make a comment?

23 MR. COWAN: I'm sorry?

24 MR. HANKINSON: Do you mind if I

1 make a comment, for clarity?

2 MR. COWAN: Yes. Go ahead.

3 MR. HANKINSON: I think he used
4 the word ContextMedia in that answer instead
5 of HAN at one point.

6 MR. COWAN: Fair enough.

7 A. I may have misstated.

8 Q. Do you have an opinion as to
9 whether HAN would have been able to retain
10 this practice that's referenced in
11 Plaintiff's Exhibit 5 had the practice
12 provided advance written notice of its intent
13 to cancel to HAN in accord with the
14 enrollment agreement?

15 MR. HANKINSON: Objection.

16 A. There were some hypotheticals, I
17 think, baked into your question, but
18 generally, I have an opinion that the
19 evidence does not support the conclusion that
20 HAN would have retained the practices that
21 elected to convert to ContextMedia.

22 And I talk about that in my
23 report. I also talk about some of the
24 alternatives that were available to both the

1 practices and to ContextMedia that I think
2 ought to also be considered as part of this
3 in this question.

4 Q. And what's the basis for that?

5 A. The basis of that is the
6 evidence and testimony that's available in
7 the case, and my understanding of the factors
8 that were important to practices and their
9 enrollment decisions.

10 Q. Do you know what factors were
11 important to this practice, practices
12 referenced in Exhibit 5?

13 A. I would need to cross-reference
14 this practice against CMS database and see if
15 this practice was discussed by some of the
16 witnesses.

17 I provided examples of testimony
18 and evidence in my report. Without
19 cross-referencing, I don't know if that
20 testimony and evidence related to this
21 practice or to other practices, but I do have
22 an understanding generally of the factors
23 that were important.

24 Q. Did you have an understanding,

1 from any of the evidence reviewed, that
2 Context wanted to have the opportunity to try
3 and save its practices if they were notified
4 of possible movement to a competitor?

5 A. Ms. Lawrence testified about
6 that, yes.

7 Q. Context, I'm saying.

8 A. Oh, excuse me. I'm sorry. I
9 misunderstood your question. Can you please
10 repeat?

11 Q. Right. Did you have an
12 understanding that Context wants to have an
13 opportunity to try to save practices, its
14 practices from switching?

15 A. That sounds like a logical
16 inference. I believe Mr. Shah may have
17 testified about this. I'd have to refresh my
18 recollection by reviewing his testimony.

19 I also recall him testifying
20 that perhaps Context hasn't lost many
21 practices. That's my memory.

22 Q. Do you think that may be because
23 its competitors play right?

24 MR. HANKINSON: Objection.

1 A. I don't have opinions about
2 that.

3 Q. So let me try to understand.
4 Are you going to be rendering opinions in
5 this case on the issue of causation?

6 A. I'm going to be offering
7 opinions, as I understand it, on damages
8 related to questions, which I think does
9 include an assessment of, again, whether and
10 to what extent HAN would have realized
11 incremental sales and profits but for the
12 alleged wrongful conduct.

13 And as part of that, I expect to
14 consider issues related to demand for the
15 products, issues related to whether that
16 demand is attributable to the alleged
17 wrongful conduct, versus other factors,
18 alternatives available to ContextMedia and to
19 practices, HAN's capacity to retain those
20 practices.

21 And then on the unjust
22 enrichment side, there's a question of
23 apportionment. ContextMedia generated sales
24 and profits as a result of converting

1 practices to -- from HAN, and the question,
2 then, is what's a portion of those sales and
3 profits that's attributable to the alleged
4 wrongful conduct, vis-a-vis the other
5 contributions that ContextMedia made to the
6 commercial success of its own products.

7 And in order to answer that
8 question, I think one ought to consider
9 issues related to the same demand driver and
10 alternatives that I just discussed.

11 So there are a couple of areas
12 where causation becomes important to an
13 assessment of damages, and if asked, I expect
14 to testify about those damages related
15 issues.

16 Q. At the end of the day, is the
17 causation issue as it relates to damages a
18 question of why the practice decided to
19 switch?

20 MR. HANKINSON: Objection.

21 A. That's not the way that I think
22 about it in my mind. That could be a
23 question to -- for one to ask and consider in
24 connection with the damages analysis, but

1 there's also the question of what's the
2 portion of the available profit that should
3 be attributed to the alleged wrongful conduct
4 versus the other contributions that
5 ContextMedia made.

6 Q. Let's leave that aside. Let's
7 just talk about your but-for causation.

8 A. That's part of the same
9 consideration, so I don't know what you mean
10 by let's keep that to the side.

11 Q. Well, what do you believe that
12 HAN needs to show for but-for causation?

13 MR. HANKINSON: Objection.

14 A. From a damages perspective, in
15 order to demonstrate its entitlement to lost
16 profits, in my opinion, HAN needs to show
17 that but for the alleged wrongful conduct, it
18 would have generated incremental sales and
19 profits.

20 And in order to establish that,
21 my opinion, HAN ought to establish that the
22 demand for the products and services was
23 driven by the alleged wrongful conduct, that
24 there weren't acceptable alternatives

1 available to the practices nor to
2 ContextMedia, and that HAN had the capacity
3 to make those sales, and that HAN could have
4 made those sales profitably.

5 So there are some considerations
6 that one ought to consider in order to
7 establish but-for causation from a lost
8 profits perspective.

9 On the profit disgorgement side,
10 it's my understanding that the law has said
11 that's an equitable measure of relief subject
12 to the principles of equity.

13 And that's something that the
14 Court or the trier of fact is going to
15 determine, assuming liability is found, and
16 there could be causation in the way issues
17 that might weigh on that determination as
18 well.

19 Q. Is it your opinion that the HAN
20 practices that switched to Context switched
21 for reasons other than the alleged wrongful
22 conduct?

23 A. I think that's a reasonable
24 conclusion that could be made on the basis of

1 the evidence that's available in this case.
2 That said, is my opinion that Dr. Wilner had
3 not established but-for causation to lost
4 profits with the exception of the
5 acceleration of conversions. So it's a
6 little bit of a nuance answer to your
7 question.

8 Q. But in terms of your conclusion
9 that it's reasonable, based on the evidence,
10 to conclude that the HAN practices switched
11 to Context for reasons other than the alleged
12 wrongful conduct, are you relying primarily
13 on the evidence relating to what the
14 practices communicated to HAN?

15 A. There were documents and
16 corporate testimony, and there's a lot of
17 evidence I considered. And I included that
18 in my report. And we can go through it, but
19 generally, it includes documents and
20 testimony.

21 Q. I understand that. Really all
22 evidence in this case is either documents or
23 testimony. You understand that?

24 A. I'm just trying to answer your

1 questions as best as I can.

2 Q. No, I understand. So I
3 understand that the evidence in this case
4 consists of documents and testimony. My
5 question is that those documents and the
6 testimony, as it relates to the issue of a
7 HAN practice leaving for reasons other than
8 the alleged wrongful conduct, that is based
9 on comments made or statements made by a HAN
10 practice as to its reasons for leaving?

11 A. In part. There's other evidence
12 that corroborates that, including documents
13 that were prepared in the normal course of
14 business by HAN, corporate testimony related
15 to those reasons, and my understanding based
16 on my discussions with ContextMedia
17 personnel, in particular Mr. Demas.

18 Q. But in terms of determining why
19 a practice, a HAN practice left HAN and went
20 to Context, one would have to know why the
21 practice decided to do that?

22 MR. HANKINSON: Objection.

23 A. Could you please repeat that
24 question?

1 Q. Right. I'm not trying to make
2 this difficult. But in terms of trying to
3 determine, form an opinion as to whether a
4 HAN practice left for reasons other than the
5 alleged wrongful conduct, one would need to
6 know from the practice?

7 MR. HANKINSON: Objection.

8 A. That is, I think, a source that
9 one could consider. Indeed, there was some
10 of that evidence available in this case from
11 the CMS database.

12 I also considered the corporate
13 testimony of some of the witnesses that were
14 involved who had opinions about that topic
15 based on their experience and training.

16 There's one other caveat that
17 I'd like to make, which is that in Dr. Wilner's
18 second report, he referenced an industry
19 analysis, or an analysis that HAN employees
20 prepared.

21 That's not something that's been
22 made available to me, and so it may be that
23 that would be another source of information
24 to consider if it's produced, and if the --

1 if it's a methodology, if I had an
2 understanding of what methodology was
3 employed.

4 And so generally, I think yeah,
5 you'd want to consider all the available
6 information that you have in order to ensure
7 that you have a reasonable opinion.

8 Q. I understand that. But in order
9 to determine why a practice left, you're
10 going to have to know the reasons for the
11 practice's decision, correct?

12 MR. HANKINSON: Objection.

13 A. Generally, I agree that in order
14 to understand why a practice left, you or one
15 could consider the evidence from that
16 practice about why they left.

17 Q. And the testimony, the corporate
18 testimony that you have referenced, the HAN
19 employee testimony and corporate testimony,
20 their testimony about why practices left is
21 based on what practices tell them?

22 MR. HANKINSON: Objection.

23 A. They did testify that they -- I
24 included a section in my report about this,

1 that they were -- they used databases in the
2 normal course of their business, and they
3 viewed that as the best source of company
4 information about why practices left; and
5 that they were trained to determine customers
6 reasons for leaving.

7 And they also testified that
8 they believed that those practices were, by
9 and large, truthful, but they also may have
10 opinions based on their positions and
11 understanding of the market and the products.
12 And I think that that's something that one
13 could probably consider as well, seeing -- on
14 the ContextMedia side.

15 Q. Do you believe that you have any
16 scientific knowledge that will help the jury
17 understand why a HAN practice decided to
18 leave?

19 MR. HANKINSON: Objection.

20 A. I think I have expert opinions
21 about the application of the evidence
22 associated with why practices decided to
23 leave, to a profit disgorgement calculation,
24 that I think I could help the trier of fact

1 understand.

2 That said, my opinions are based
3 on the evidence that's been made available in
4 this case, including the documents in the
5 associated deposition testimony. That's not
6 something that I have personal knowledge
7 about, rather I have reviewed that evidence
8 in order to determine or provide opinions
9 about the portion of the profits that are
10 attributable to the various factors that
11 drive sales.

12 Q. And so I'm going to stick with
13 my question. I'm going to be very specific
14 on it. And I'm going to go through sort of
15 several that are going to be like it.

16 Do you believe that you have
17 scientific knowledge that will assist the
18 jury in determining why a particular practice
19 decided to leave HAN and go --

20 MR. HANKINSON: Objection.

21 Q. -- to Context?

22 A. Same answer as the one I just
23 gave.

24 Q. You didn't answer it. My

1 question is, yes or no, do you believe that
2 you have scientific knowledge that you
3 believe will assist the jury in determining
4 why a HAN practice decided to leave HAN and
5 go to Context?

6 MR. HANKINSON: Objection.

7 A. My answer is the same, which is
8 that I'm -- it's the application of that to
9 the determination of damages is where my
10 expertise comes in.

11 I'm not offering opinions about
12 why a particular practice left on a
13 scientific basis or a personal knowledge
14 basis. What I'm offering opinions about is
15 the profit related and damages related
16 issues.

17 Q. Do you believe that a jury of
18 lay people is capable of determining, without
19 expert testimony, why a HAN practice decided
20 to leave HAN and join Context?

21 MR. HANKINSON: Objection.

22 A. I don't have an opinion about
23 that. A couple things that are coming to
24 mind, for example, is that Dr. Wilner

1 referenced industry experts or employee
2 experts from HAN that he needed to rely upon
3 in order to make that determination.

4 Of course, there's other
5 evidence and testimony in this case that I
6 think gets to the essence of that issue. I
7 do think I could assist the trier of fact in
8 providing the nexus between some of those
9 demand drivers and the determination of
10 damages or profits.

11 Q. But on the core fundamental
12 issue of why a practice decided to leave HAN
13 and join Context, you believe that the jury
14 can determine that issue without expert
15 testimony, don't you?

16 MR. HANKINSON: Objection.

17 A. I don't have an opinion about
18 that. I don't have an opinion about that.

19 Q. But it's not your intent to
20 provide expert testimony on that issue, why a
21 practice left -- simply this issue -- why a
22 practice left HAN and joined Context?

23 A. I think that that question has
24 relevance to the determination of damages,

1 including lost profits damages and profit
2 disgorgement damages, and I think it ought to
3 be properly considered in order to quantify
4 damages.

5 So that's really an input into a
6 damages analysis, as opposed to that I'm
7 providing, in the de novo source of providing
8 an industry expert opinion and/or something
9 like that, that I would characterize as where
10 I'm the de novo source of that information.
11 Does that clarify?

12 Q. It doesn't. So do you believe
13 that you have any technical expertise that
14 would assist a jury in understanding simply
15 why a practice decided to switch from HAN to
16 Context?

17 MR. HANKINSON: Objection.

18 A. And I'm giving the same answer
19 that I've been providing you, which is that
20 it's the nexus between that decision and the
21 determination of damages is where I can
22 assist the trier of fact.

23 It's understanding measures of
24 monetary relief, and how that evidence

1 impacts the type of relief that may be
2 available to HAN upon a finding of liability.

3 Q. But my question is -- I'm
4 leaving aside the nexus. I'm talking simply
5 on the issue of why a practice decided to
6 leave HAN and join Context. Do you believe
7 you have any technical expertise that would
8 aid the jury in determining that specific
9 issue?

10 MR. HANKINSON: Objection.

11 A. Potentially.

12 Q. How so?

13 A. Dr. Wilner has referenced an
14 analysis that was conducted by employee
15 experts. That analysis has not been made
16 available to me.

17 If made available, I would want
18 to try to understand the facts and data that
19 was relied upon, the methodology that was
20 employed, and I may be able to offer opinions
21 about whether that methodology supports the
22 conclusions that Dr. Wilner purports.

23 It hasn't been made available to
24 me, and so I don't know whether or not I

1 would have opinions to offer about that.

2 Generally, though, my opinions
3 relate to the nexus issues related to
4 damages, and the calculation of damages, as
5 opposed to having independent technical
6 opinions about the reasons why practices
7 switched.

8 I calculate damages based on my
9 understanding of some of those factors, and I
10 think that they ought to be considered in the
11 determination of damages.

12 Q. Have you ever been engaged as an
13 expert to opine on whether a literally false
14 statement caused a customer to stop doing
15 business with someone?

16 A. We talked a little bit about
17 this this morning. I have provided opinions
18 on damages and causation related issues in
19 Lanham Act matters; and, in my mind, there's
20 not a difference between a literally false
21 statement and other false advertising or
22 false designation of origin.

23 When I think about damages, I
24 think about whether lost profits are

1 appropriate and/or the portion of profits
2 that is attributable to the alleged wrongful
3 conduct. It may be that I have. It would
4 depend on whether or not there were
5 allegations of literally false statements in
6 some of the cases that I've worked on.

7 Q. But you don't recall, as you sit
8 here?

9 A. Well, for example, we talked
10 this morning about the ICM Controls,
11 Honeywell matter. And if memory serves,
12 there were allegations there of "Made in the
13 USA." And I don't recall whether that was
14 literal falsehood or not, but I did opine as
15 to issues related to causation and damages,
16 profit disgorgement, and lost profits.

17 Q. And in that case, did you render
18 an opinion as to whether the statement "Made
19 in the USA" caused or did not cause the
20 plaintiffs to suffer damages?

21 A. If memory serves, I did, yes.

22 Q. And what were your opinions?

23 A. I don't recall precisely. I had
24 opinions about damages.

1 Q. Do you recall how you went about
2 trying to determine whether or not the
3 statement "Made in the USA" did or did not
4 cause damages?

5 A. Well, the framework that I use
6 in this case is the same framework that I
7 would use in any case, which is to first
8 start by asking the question would the
9 plaintiff have realized incremental sales and
10 profits but for the alleged wrongful conduct.

11 And in the case of a Lanham Act,
12 or false designation of origin case, I would
13 also ask the question what are the profits
14 that were realized by the defendant on a sale
15 of the accused products, and then what's the
16 portion of those profits, if any, that is
17 attributable to the alleged wrongful conduct,
18 vis-a-vis other contributions that the
19 defendant made for the commercial success of
20 those products.

21 Q. And how did you do it
22 specifically in that case? Did you talk to
23 any customers?

24 MR. HANKINSON: Objection to

1 form. Compound.

2 MR. COWAN: Fair objection.

3 Q. In that case, did you talk to
4 any customers?

5 A. If memory serves, there was an
6 industry expert that I did talk to, who I
7 believe had experience as a customer. It was
8 more of a consumer product type of a product.

9 Q. Do you have an opinion as to
10 what would be the best way to determine
11 whether a literally false statement made by a
12 competitor caused the customer to switch to
13 the competitor?

14 A. I mean, I have opinions about
15 the factors that ought to be considered in
16 making that determination, sure.

17 Q. And I'm talking about what would
18 be the best way to try to make that
19 determination?

20 A. I have opinions about -- that I
21 think are appropriate and reasonable.

22 Q. Sure. What are those?

23 A. Well, one ought to consider
24 whether or not, but for the alleged wrongful

1 statements, there would have been any
2 difference in the sales and profits realized
3 by the plaintiff after considering the
4 factors that we've talked about. And I can
5 run through them again if you'd like, or not?

6 Q. No, that's okay, but what's the
7 best way to go about making that
8 determination?

9 A. The same process that I just
10 explained. Would you like me to try to
11 provide more --

12 Q. So do you believe it would be
13 important to talk directly with a customer to
14 make that determination?

15 A. That's not always something
16 that's available.

17 Q. I understand it's not always
18 available. These are customers. The
19 practices we're talking about are practices
20 of Context, correct?

21 A. My last answer was incomplete.

22 Q. Go ahead.

23 A. I lost my train of thought.

24 Q. You said it's not something

1 that's always available.

2 A. Well, in my experience, parties
3 in litigation typically do not like to
4 involve their customers in the litigation
5 process, so that's not something that's
6 always available to me.

7 I didn't speak with any
8 practices in this case, but I had a lot of
9 evidence to consider, including deposition
10 testimony and the records that we talked
11 about this morning, in order to reach a
12 reasonable conclusion.

13 Q. Would it have been helpful to
14 talk to any of the HAN practices that
15 switched to Context?

16 A. I had sufficient information to
17 render my opinions, so if they were made
18 available to me, sure, I'd talk to them.

19 Q. That wasn't my question. My
20 question was, would it have been helpful to
21 have talked to the HAN practices that
22 switched to Context?

23 MR. HANKINSON: Objection.

24 A. Helpful in the sense of

1 furthering my understanding?

2 Q. Sure. Rendering your opinions.

3 A. I had sufficient information to
4 render my opinions. If they were made
5 available, I would expect to talk to them. I
6 don't know.

7 Q. My question, sir, is very
8 straightforward. Would it have been helpful
9 to you, in rendering your opinions and
10 formulating your conclusions, to have talked
11 to any of the HAN practices that switched?

12 MR. HANKINSON: Objection.
13 That's not straightforward, and it calls for
14 speculation, and it's been asked and
15 answered.

16 A. Same answer as the one I've been
17 giving.

18 Q. So you would have done it if it
19 was made available, but it's not something
20 you felt necessary to do?

21 A. That's a fair characterization.
22 I had a lot of evidence in this case to
23 consider.

24 Q. Did you ask?

1 A. No.

2 Q. Was it offered to you?

3 A. I don't recall that, no. Sir?

4 Q. Go ahead.

5 MR. HANKINSON: Did we mark this
6 e-mail from Deven Tatum dated January 3rd?

7 MR. COWAN: I thought we did.

8 MR. HANKINSON: Is it 5?

9 MR. COWAN: Yes.

10 MR. HANKINSON: Thanks.

11 THE WITNESS: Okay. Thank you.

12 BY MR. COWAN:

13 Q. Do you believe it would be
14 important to tell the customer what the
15 literally false statements were in order to
16 determine whether the statements caused the
17 customer to switch?

18 A. I don't understand that
19 question.

20 Q. If you're trying to determine,
21 as I think you are in this case, whether a
22 false statement made to a practice caused
23 them to switch, do you believe that it would
24 be important to tell the customer what the

1 false statement was in order to reach that
2 determination?

3 A. No, not necessarily.

4 Q. Why not?

5 A. Well, I think one ought to
6 consider the available evidence about what
7 caused that practice to switch. I don't
8 think that requires the provision that you
9 asked me about.

10 Q. So if the practice does not know
11 its lied to, how can you tell whether or not
12 that was a factor in its decision to switch?

13 A. I think one can make the
14 determination based on the individual
15 practices, and what they said and what was
16 important to them, along with the testimony
17 and the documents that were prepared in the
18 normal course of business by the party too.

19 So if there was additional
20 information that a practice provided about
21 what drove its decision, then sure, I'd want
22 to consider that.

23 Q. Have you ever been involved in
24 Lanham Act cases involving false advertising

1 where customers were actually provided what
2 the alleged false statement was, and asked to
3 provide their commentary on it in terms of
4 whether or not it influenced their decision?

5 A. I think so. I don't know about
6 the literally false aspect, if that was a
7 predicate of your question, but I think
8 that -- I think so.

9 Q. Why is that done --

10 MR. HANKINSON: Objection.

11 Q. -- to your knowledge?

12 A. To further an understanding of
13 the portion of profits that may be
14 attributable to the alleged wrongful conduct,
15 vis-a-vis the other contributions that the
16 defendant makes to the commercial success of
17 the accused product.

18 Q. And that was not done by you or
19 Context in this case, correct?

20 A. Can you tell me what the "that"
21 is?

22 Q. Providing to the customer,
23 telling the customer the actual false
24 statement, and asking them to comment on it

1 in terms of their decision to switch, or its
2 impact on them.

3 A. Right. I mean, there was not a
4 survey that was conducted that I'm aware of
5 in this case. In some cases there are
6 surveys that may be available.

7 Q. And when it's done, why is that
8 done?

9 MR. HANKINSON: Objection.

10 A. Well, there could be surveys
11 done for all sorts of reasons; for example,
12 sometimes in the normal course of business,
13 companies survey their customers in order to
14 help understand how to modify their products
15 to respond to competitive advantages or
16 competitive situations in the marketplace.

17 And in the context of
18 litigation, sometimes surveys are performed
19 to establish liability reasons, or for
20 liability reasons, and sometimes surveys are
21 performed in order to assist in the
22 determination of damages. So that happens
23 from time to time for a myriad of reasons.

24 Q. The comments from customers that

1 are reflected in the CMS database concerning
2 their reasons for leaving HAN and going to
3 Context, were those comments all made after
4 the practice had decided to switch to
5 Context?

6 A. I think we'd have to go look at
7 that CMS database, and I'd need to take
8 another look at that in order to answer the
9 question. I think that should be
10 determinable.

11 If memory serves, there were
12 some practices that -- for which entries were
13 made that subsequently didn't switch, or
14 there have been some instances of that, and I
15 just don't know from a factual standpoint
16 without looking at the underlying document.

17 Q. Well, would you agree with me
18 that if HAN contacted a practice to ask them
19 why they had cancelled, that would have been
20 done after, at least after HAN received
21 notice that they had cancelled?

22 MR. HANKINSON: Objection.

23 A. That sounds intuitive to me;
24 but, again, I just would need to go look at

1 that document. And I don't recall precisely
2 whether there may be instances of entries
3 that were made outside of the context of a
4 particular practice switching, or a practice
5 that was retained. I just am not a hundred
6 percent sure without looking at that
7 document.

8 Q. Is that something that would be
9 important to you to know?

10 A. Can you help me with the "that"
11 again?

12 Q. Would it be important, in the
13 context of the opinions that you're rendering
14 in this case, to know whether the comments
15 that you're relying upon, where the practice
16 is commenting on its reasons for switching,
17 were made after it had decided to cancel with
18 HAN?

19 A. I think I would consider
20 available information if it was prospective
21 or retrospective. Again, it sounds intuitive
22 to me that most of the comments in the CMS
23 database were retrospective comments, but I
24 would also consider, if available,

1 prospective comments.

2 Q. Do you know whether or not
3 Context coached any HAN practices about what
4 to tell HAN when HAN called about the
5 cancellation?

6 A. I'm aware of those allegations
7 that have been made, and I read that in
8 Dr. Wilner's report, and I also recall, I
9 believe, Ms. Lawrence testifying about that.
10 I'm not aware of that.

11 Q. Did you ask anyone at Context if
12 they did so?

13 A. No.

14 Q. That would be important,
15 wouldn't it?

16 A. I'm not aware of evidence about
17 that. If there was evidence that, again, for
18 any particular practice, that there was
19 alleged wrongful conduct that resulted in the
20 conversion of a practice, that's something
21 that I would want to understand and consider,
22 but I'm not aware of that.

23 Q. I'm not talking about alleged
24 wrongful conduct in connection with

1 conversion of a practice.

2 What I'm saying is it would be
3 important to you to know whether a comment
4 that was made by a practice that's reflected
5 in the CMS database was based on coaching
6 from Context?

7 MR. HANKINSON: Objection.

8 A. Depends.

9 Q. Can you imagine a situation in
10 the world where that would not be important
11 to you?

12 A. Yeah. Depends on why that
13 practice made the determination to switch.
14 And the question, then, is was it due to the
15 alleged wrongful conduct, or was it due to
16 other factors.

17 If it was due to the alleged
18 wrongful conduct, then that's something that
19 would, I think, give rise to damages; if it
20 was not, then I think it would not.

21 Q. And maybe we may be
22 misconnecting here.

23 A. Okay.

24 Q. My question, first of all, it is

1 true that you considered and relied upon
2 comments made by practices to HAN, as
3 reflected in the documents, about their
4 reasons for cancelling and switching to
5 Context?

6 A. Yes, along with the testimony
7 and other evidence.

8 Q. And if those comments that you
9 relied upon by the practice were based on
10 coaching from Context, that would be
11 important to know, correct?

12 MR. HANKINSON: Objection.

13 A. Again, it depends on --
14 potentially, it depends on whether or not the
15 practice was converted as a result of the
16 alleged wrongful conduct.

17 Q. You're assuming they were?

18 A. No. I'm assuming that they
19 converted from HAN to Context. I'm not
20 assuming that they were converted because of
21 the alleged wrongful conduct. That's a
22 question that needs to be answered in order
23 to determine damages.

24 Q. I'm sorry. I missed it. I

1 thought we began this whole discussion by you
2 saying everything you're doing is based on
3 the assumption that there's proven liability
4 that it was alleged wrongful conduct?

5 A. I did make that assumption, yes.

6 Q. We agree that you have relied
7 upon comments made by practices to HAN
8 personnel, when they were contacted by HAN
9 personnel to ask them about why they were
10 cancelling?

11 A. In part. I reviewed that, along
12 with other testimony and documents, yes.

13 Q. Would you concede to me that
14 that is a large part of your but-for
15 analysis?

16 A. That's a -- large is on a
17 continuum. I'm trying to navigate this with
18 you. It's something that I considered, along
19 with the balance of analyses I performed in
20 my report.

21 Q. And if the comments that you
22 relied upon were based on coaching by
23 Context, that would be important to you?

24 MR. HANKINSON: Objection.

1 A. I'm saying -- the question that
2 I'm trying to answer is whether the alleged
3 wrongful conduct caused damages, and the role
4 that the alleged wrongful conduct played in,
5 or the portion of the profits that
6 ContextMedia realized that's attributable to
7 the alleged wrongful conduct.

8 The alleged coaching may be a
9 factor that would have an impact on whether a
10 particular practice was converted as a result
11 of the alleged wrongful conduct, but it may
12 not, even assuming the alleged coaching was
13 what transpired.

14 It would really depend on
15 whether or not that practice would have
16 converted from HAN to ContextMedia but for
17 the alleged wrongful conduct. And that's a
18 determination that needs to be made.

19 Q. Right. But you have concluded
20 that practices switched not for the alleged
21 wrongful conduct, but for other reasons?

22 MR. HANKINSON: Objection.

23 A. I think that's a reasonable
24 conclusion that one could make based on the

1 evidence that's available in this case.

2 Q. And much of that conclusion is
3 based on comments that the practices gave to
4 HAN as to why they switched?

5 A. Some of that conclusion is based
6 on that evidence.

7 Q. For example, you've got in your
8 report, do you not, reference to practices
9 saying we thought that the HAN content was
10 boring?

11 A. That's generally consistent with
12 what I recall some of the practices have
13 said. Now, that's also consistent with what
14 some of the witnesses have said.

15 Q. And if it turns out that Context
16 employees had coached the practice to tell
17 HAN when they were contacted, tell them that
18 you thought the reason you're leaving is
19 because you thought it was boring, that would
20 be important to you?

21 MR. HANKINSON: Objection.

22 A. Again, it's the same answer as
23 I've been saying it. It would -- in order
24 for that to have an impact on damages, you

1 need to determine whether or not that changes
2 the practices that were converted by
3 ContextMedia from HAN but for the alleged
4 wrongful conduct. And it may or may not. It
5 would depend on that particular practice. So
6 that's the answer.

7 Q. And how would you determine
8 that?

9 A. You would determine it by
10 considering whether or not that practice,
11 that particular practice would have not been
12 converted by ContextMedia but for the alleged
13 wrongful conduct.

14 Q. How would you do that?

15 A. By considering the available
16 evidence.

17 Q. If the available evidence
18 consisted of comments that were made by the
19 practice based on coaching from Context, how
20 would you make that determination?

21 MR. HANKINSON: Objection.

22 A. You would want to consider the
23 evidence I considered in my report in order
24 to make that determination. And if there's a

1 particular practice for which it wouldn't
2 have been converted but for the alleged
3 wrongful conduct, then I think the next
4 question is would that practice have been
5 retained by HAN, what alternatives would that
6 practice have considered, what alternatives
7 were available to ContextMedia, and you need
8 to keep considering the balance of the
9 causation factors.

10 Q. But it is true that your
11 opinions and conclusions in this case are
12 based, at least in part, on what the HAN
13 practice told HAN after it had cancelled with
14 HAN?

15 A. That is part of the evidence
16 that I considered, along with the other
17 evidence.

18 (Plaintiff's Exhibit No. 6
19 was marked for identification.)

20 Q. Let me hand you what's been
21 marked as Plaintiff's Exhibit 6. Take a
22 minute and read this, and see if you are
23 familiar with this document.

24 A. (After reviewing document) I've

1 reviewed this document.

2 Q. Who is Sylvia Velazquez?

3 A. I don't have a title for Sylvia
4 Velazquez.

5 Q. Do you know what her role is at
6 Context?

7 A. No.

8 Q. In her e-mail, which is at the
9 top of the first page of Exhibit 6, the last
10 full paragraph, she says, "From my end, I
11 think issues arise when the clinic thinks the
12 competitor is going to be in good spirits
13 that they're cancelling their contract.

14 "Similar to when any of us
15 cancel cable TV, a credit card, a gym
16 membership, the company will be a bit annoyed
17 and push to retain.

18 "The clinics should be ready to
19 expect this, and I try to prep them for this
20 as best I can during my confirmation call
21 with the new member." Do you see that?

22 A. Yes.

23 Q. Do you know what it is that
24 Ms. Velazquez does when she tries to prep the

1 practice in advance of the call from the
2 competitor who is losing the practice?

3 MR. HANKINSON: Objection to
4 form.

5 A. No. I would defer to the folks
6 at ContextMedia. No.

7 Q. Would it be important to you to
8 know what prepping was done by ContextMedia
9 in advance of a call from HAN to the practice
10 concerning cancellation?

11 MR. HANKINSON: Objection.

12 A. I don't think so. Only to the
13 extent that it would -- if there was an
14 influence on the practice enrollment
15 decision, then it may.

16 But in this type of an example
17 was what I was trying to explain before.
18 We've got, it appears, an office that wanted
19 to go with ContextMedia, and that decision is
20 what drives the revenue to some degree from
21 ContextMedia side.

22 And the question then is would
23 this revenue have been realized by
24 ContextMedia absent the alleged wrongful

1 conduct. That's the question that we need to
2 answer.

3 Q. So let's use this as an example,
4 as you said.

5 A. Sure.

6 Q. If the reason that the practice
7 decided to switch was because they were told
8 that the HAN loop consisted of 50 percent
9 ads, and that's the reason they decided to
10 leave, that would be a decision based on an
11 improper or an unlawful conduct, correct?

12 MR. HANKINSON: Objection.

13 A. Under the assumption that that's
14 my understanding of what the allegations are
15 of some of the alleged wrongful conduct.

16 And so if that practice made the
17 decision to leave as a result of that alleged
18 wrongful conduct, and that does have
19 implications as to lost profits, and it also
20 has implications as to profit disgorgement,
21 and they're separate considerations. So do
22 you want me to keep talking about that,
23 or --

24 Q. No.

1 A. Okay.

2 Q. And if that same practice was
3 coached or prepped by Context to tell HAN
4 that the reason they left was because they
5 found the program boring or repetitive, that
6 would be important to know?

7 MR. HANKINSON: Objection.
8 Speculation.

9 A. What I'm trying to say is in
10 order to determine damages, a determination
11 needs to be made of whether and to what
12 extent the revenues and profits of HAN and
13 ContextMedia would have been changed or have
14 been implicated by the alleged wrongful
15 conduct.

16 And that's not -- in my mind,
17 there's a question as to whether there's any
18 linkage with respect to the alleged coaching.
19 I did consider evidence about practice
20 enrollment decisions, along with the
21 testimony, so it just depends, is my answer.

22 Q. And I'm not suggesting that the
23 coaching was the reason for the switch. I'm
24 suggesting that the coaching impacts the

1 evidence that you've relied upon to make a
2 determination that the practice switched for
3 legitimate reasons.

4 MR. HANKINSON: Objection.
5 Calls for speculation.

6 A. Same answer as the one I've been
7 giving, which is the focus is on the -- my
8 focus is on what would have happened but for
9 the alleged wrongful conduct in terms of
10 sales and profits.

11 And there's a lot of evidence,
12 including the CMS database, and the
13 deposition testimony of fact witnesses, and
14 documents that were prepared in the normal
15 course of business, so it is something that I
16 would consider.

17 And to the extent that I learn
18 of alleged coaching with respect to a
19 particular practice, that's something that I
20 think I would consider.

21 I'm not prepared to say that
22 that's going to have an impact on my
23 conclusions. I would just need to understand
24 the nature of the allegation.

1 MR. COWAN: Fair enough. It's
2 12:12. Do you want to take a break for
3 lunch?

4 THE WITNESS: That sounds good.
5 I'm getting hungry.

6 MR. HANKINSON: That would be
7 fine.

8 (Lunch recess.)

9 MR. COWAN: Let's go back on.

10 Q. Turn to page 48 of your report
11 if you would.

12 A. (Complies with request.)

13 Q. In the section here, you say,
14 "Based on my review, while certain comments
15 within the CMS database indicate that HAN
16 personnel were querying practices as to the
17 reasons underlying their switch, and
18 ContextMedia's alleged wrongful conduct and
19 recording their responses, the recorded
20 comments indicate that the practice
21 enrollment decisions were ultimately based on
22 factors unrelated to the alleged wrongful
23 conduct." Do you see that?

24 A. Yes.

1 Q. And then you go through and you
2 have some citations to various locations
3 there; is that right?

4 A. Right.

5 Q. What were you trying to convey
6 here? What was the point you were trying to
7 make in this section?

8 A. Trying to assess two things.
9 One, I was trying to assess Dr. Wilner's
10 assumption of causation for lost profits.

11 And then second, I was
12 interested in assessing the portion of ethics
13 media profits that may be reasonably
14 attributed to the alleged wrongful conduct.
15 So these are some qualitative factors that I
16 think are -- have some bearing on those
17 issues.

18 Q. And what are the qualitative
19 factors?

20 A. What are those qualitative
21 factors?

22 Q. Right.

23 A. I would refer you again to
24 page 17 of my report, where I have a bullet

1 listing of some of the qualitative factors,
2 including some of the factors that drive
3 customer enrollment decisions, and the
4 relative importance of those factors;
5 differences between the products of HAN on
6 the one hand and ContextMedia on the other
7 hand; evidence associated with whether the
8 practices were converted that's attributable
9 to the alleged wrongful conduct, as well as
10 my consideration of alternatives.

11 Q. Let's go back to page 48, the
12 reference to the Okolocha Medical Corp.
13 What were you trying to convey here?

14 A. I was trying to convey the
15 evidence associated with the reasons for the
16 switch from HAN to ContextMedia.

17 Q. And as I understand it, you
18 believe that this evidence, as it's reflected
19 relating to Okolocha Medical Corp.,
20 demonstrates to you that the practice
21 enrollment decision was ultimately based on
22 factors unrelated to the alleged wrongful
23 conduct?

24 A. I think it's unreasonable to

1 conclude that the alleged wrongful conduct
2 was the primary determinant with respect to
3 this practice and other practices, and for
4 the reasons that are included in the section
5 there for Okolocha Medical Corp., as well as
6 some of the other evidence and testimony in
7 my report.

8 Q. You used the qualifier primary.
9 Why?

10 A. Could we please have your
11 question and my answer read back?

12 Q. Sure.

13 A. Because I wasn't thinking of it
14 that way.

15 MR. COWAN: Go ahead and read
16 that back, Sue.

17 (The record was read by the court reporter.)

18 A. I think you could remove the
19 word primary from that answer, and the
20 substance of my opinion would be the same.

21 Q. And how is it that, reading the
22 reported comments here on page 48 relating to
23 Okolocha, you arrive at the conclusion that
24 the alleged wrongful conduct had no impact on

1 the decision of this practice to switch?

2 A. I'm not aware of evidence that
3 would suggest that the alleged wrongful
4 conduct was attributable, or the -- I could
5 state it another way.

6 I'm not aware of evidence that
7 would corroborate that the practice decision
8 was driven by the alleged wrongful conduct,
9 vis-a-vis the other factors that are outlined
10 here.

11 Q. Right. But what you say is the
12 recorded comments, referring to what you have
13 here on page 48, indicate that the practice
14 enrollment decisions were ultimately based on
15 factors unrelated to the alleged wrongful
16 conduct. What in this comment leads you to
17 that conclusion?

18 A. This comment is an example of
19 practices indicating that the program was
20 less desirable than -- well, at least the HAN
21 program, the comment is that the program did
22 not have a lot on it. It was boring.

23 And that's generally consistent
24 with some of the other comments that I've

1 seen with respect to other practice
2 enrollment decisions.

3 And so what I was trying to do
4 was understand, again, what were the factors
5 that were considered by the practices, and
6 how important was the alleged wrongful
7 conduct by way of comparison with some of the
8 other factors. And ultimately, I think that
9 gets to the issue of apportionment.

10 Q. Do you know whether or not any
11 false statements were made to Okolocha
12 Medical Corp. by Context?

13 A. I have assumed that liability
14 will be found. And that said, I do not know
15 or have an opinion that there was an alleged
16 false statement made to that particular
17 facility.

18 Q. And are you drawing the
19 conclusion that this practice was not
20 influenced by any false statement made to it
21 by Context because there's no reference to
22 the false statement in here?

23 A. Well, there is no reference to
24 the false statement in here that I can see,

1 but my conclusion that HAN has not
2 established causation includes considerations
3 associated with drivers of demand and
4 enrollment decisions, but also includes
5 considerations associated with alternatives
6 and some of the other factors referenced in
7 my report. So I think it's a bit broader
8 than as is implied by your question.

9 Q. And I'm just trying to
10 understand. You have cited this as evidence
11 that the practice enrollment decision of this
12 practice was ultimately based on factors
13 unrelated to the alleged wrongful conduct.

14 How can you say, based on this
15 statement here, that the practice made its
16 decision not based on unlawful conduct?

17 A. I don't see evidence that would
18 tend to corroborate that the decision was
19 made on the basis of the alleged wrongful
20 conduct, and I also considered other factors
21 beyond the factors contained in the CMS
22 database in order to reach my conclusion that
23 but-for causation has not been established by
24 HAN.

1 Q. What other factors, other than
2 what's here, did you believe influenced
3 Okolocha Medical Corp.'s decision?

4 A. Well, there's evidence in the
5 CMS database that indicates that the Okolocha
6 Medical Corp. noted that the HAN program did
7 not have a lot on it, and that was boring.

8 I've also considered that the
9 HAN witnesses and Dr. Wilner have not
10 identified evidence that would suggest that
11 the alleged wrongful conduct was the reason
12 that the practices switched.

13 I also considered, again, the
14 other bullets contained on page 17 of my
15 report that I think are important to consider
16 as well.

17 Q. Do you believe that the fact
18 that Sheila at Okolocha was, at least
19 according to the comment that you've
20 referenced, told by the HAN representative
21 that Context's removal of HAN's equipment put
22 her in jeopardy of being liable for
23 equipment, may have had any impact on the
24 statement made by Sheila later that the

1 program did not have a lot on it and it was
2 boring?

3 MR. HANKINSON: Objection.

4 A. I'm sorry. I've become somewhat
5 distracted by the pen. Could we please
6 re-ask that question?

7 Q. Sure.

8 A. Thank you.

9 Q. I'll just ask it again. Do you
10 believe that the fact, as evidenced by the
11 recorded comment that you've referred to
12 here, that Sheila was told by the HAN
13 representative that Context's removal of
14 HAN's equipment put her in jeopardy of being
15 liable for the equipment, may have had any
16 impact on any of her later statements?

17 A. I'm not aware of evidence that
18 would suggest that. The testimony in the
19 case was that the -- for the most part, the
20 HAN witnesses believed that the folks that
21 they were engaging with on the practice side
22 were being truthful. And so I am aware of
23 that evidence. I'm not aware of anything to
24 suggest otherwise.

1 Q. And I'm not asking you for
2 evidence that suggests that. You have
3 rendered, or are going to be rendering
4 opinions based on this statement here,
5 correct?

6 A. Well --

7 Q. You're drawing conclusions from
8 the words that are in the recorded comments,
9 correct?

10 A. In combination with the
11 testimony about those comments and the other
12 documents, sure.

13 Q. But just focusing on the
14 comments, which is what's set forth on
15 page 48, do you have any belief, any view
16 whatsoever as to whether when the office
17 person at Okolocha was told by the HAN
18 representative that Context's removal of the
19 HAN equipment could put them in jeopardy of
20 being liable for the equipment, may have had
21 any impact on her later comments?

22 A. I'm not aware of any evidence
23 that suggests that I did. And so I'm taking
24 it at face value, along with the testimony

1 and other evidence associated with these
2 practice enrollments.

3 Q. And I'm not asking you for
4 evidence. I'm just saying human nature,
5 you're commenting about -- you're using this
6 as evidence to support your views. Would
7 human nature suggest that that's possible?

8 MR. HANKINSON: Objection.

9 A. I took the evidence at face
10 value. I did not try to inject my own
11 opinions about human nature. And so if
12 there's evidence that would suggest, that
13 comes out that this ought not be considered,
14 then I can assess that at the time.

15 For this statement, and the
16 balance of the other statements in my report,
17 I used diligence in reviewing those, and in
18 reviewing the associated deposition testimony
19 in order to try to reach a reasonable
20 conclusion.

21 And so I think, on the basis of
22 the testimony that the HAN employees are
23 trained in order to identify the reasons that
24 practices left, and that they made notes in

1 the normal course of their business into the
2 database, and that they believe that those
3 people were being truthful, you know, that
4 led me to believe that my reliance on this
5 information, in part, was appropriate.

6 Q. So you have no opinion one way
7 or the other as to whether or not a practice
8 personnel's response or statements might be
9 influenced if they were told that they might
10 be in jeopardy of being held liable for
11 Context's removal of the HAN equipment?

12 MR. HANKINSON: Objection.

13 A. Same answer that I just gave. I
14 took these at face value, and I did not --
15 that's the answer.

16 Q. So I still don't know if I got
17 an answer. Do you or do you not have an
18 opinion?

19 MR. HANKINSON: Objection.

20 A. Can I please hear the question
21 one more time?

22 Q. Right. Do you have an opinion
23 as to whether or not the practice
24 representative's statements to HAN that are

1 reflected here may have been influenced by
2 having been told, before she made her
3 statement, that Context's removal of HAN's
4 equipment could put the practice in jeopardy
5 of being liable for the equipment?

6 MR. HANKINSON: Objection.

7 A. I don't have an opinion about
8 that.

9 Q. Look at page 49, the North
10 Dayton. Read the comment as reflected or as
11 recorded on page 49 to yourself.

12 My question is going to be, can
13 you tell who was the decision maker for North
14 Dayton Rheumatology with respect to the
15 decision to switch from HAN to Context?

16 A. (After reviewing document) I'm
17 sorry about the pen. Do you mind?

18 Q. I'm sorry.

19 A. That's okay. Your question was
20 do I know who specifically at the practice
21 made the decision?

22 Q. Correct.

23 A. On the basis of the passage
24 here, that's not indicated in this particular

1 section. It may be that one of the witnesses
2 testified about this, and I'd have to take
3 another look at the deposition testimony to
4 confirm that.

5 Q. Take a look at the next one from
6 Dr. Ferrari. Just read that one to yourself,
7 and then I'll have some questions about it.

8 A. (After reviewing document) Yes,
9 I read it.

10 Q. Now, this is a situation where,
11 at least according to the recorded comment,
12 Context told the practice that Context had
13 permission to remove HAN's equipment?

14 A. That's what this comment
15 indicates.

16 Q. And do you know whether or not
17 that comment made by Context had any impact
18 on the decision by this practice to switch?

19 A. Based on my reading of this
20 comment, just a practical reading of it, it
21 appears that the programming was the factor
22 that drove the decision.

23 Q. Let me ask you a few questions
24 about the Ferrari practice. Did you look at

1 any of Context's communications with the
2 Ferrari practice?

3 A. Insofar as those were deposition
4 exhibits or included in my documents. I'm
5 not recalling specifically.

6 (Plaintiff's Exhibit No. 7
7 was marked for identification.)

8 Q. Let me hand you what has been
9 marked as Plaintiff's Exhibit 7. Take a
10 minute and see if you recall having seen this
11 before.

12 A. After having reviewed the
13 document, I don't recall having reviewed this
14 document before.

15 Q. Would you agree with me that it
16 appears to be an e-mail from Brok Vandersteen
17 at ContextMedia to the Ferrari office?

18 A. I haven't really spent time to
19 review the document. Would you like me to do
20 so?

21 Q. Sure.

22 A. (After reviewing document) I've
23 reviewed this document.

24 Q. And your page 49, when you

1 reference the comments about Dr. Ferrari's
2 presence, references a Veronica. Do you see
3 that?

4 A. Yes. I see that on page 49 in
5 my report.

6 Q. And Exhibit 7 is an e-mail from
7 Brok to doctor.ferrari@yahoo.com. It says
8 "Hi, Veronica"?

9 A. I see that, yes.

10 Q. Now, in his e-mail, October 25,
11 2011, he's referencing both Healthy Advice
12 and Accent Health. Do you see that?

13 A. I do see that, yes.

14 Q. And with respect to Healthy
15 Advice, what he says is, "We also have less
16 ads and more customization features." Do you
17 see that?

18 A. He said, "We also have less ads
19 and more customization features." I see
20 those words.

21 (Plaintiff's Exhibit No. 8
22 was marked for identification.)

23 Q. Let me hand you Plaintiff's
24 Exhibit 8. This is another e-mail from

1 Mr. Vandersteen to Veronica at Dr. Ferrari's
2 office a few weeks later. Do you see that?

3 A. Yes. Would you like me to take
4 the time to read this?

5 Q. Sure. Please.

6 A. I've reviewed this document.

7 Q. You'll see, in the second full
8 paragraph now, Mr. Vandersteen is saying,
9 referring to Healthy Advice, "We also have
10 far less ads than Healthy Advice in each
11 loop." Do you see that?

12 A. I see that sentence.
13 (Plaintiff's Exhibit No. 9
14 was marked for identification.)

15 Q. This is Plaintiff's Exhibit 9,
16 which is now a January 9, 2012 e-mail from
17 Mr. Vandersteen to Veronica at Dr. Ferrari's
18 office. Do you see that?

19 A. Yes. Would you like me to take
20 a moment to read this?

21 Q. Take a moment and read it, if
22 you would.

23 A. (After reviewing document) I've
24 reviewed this.

1 Q. So at least it appears, based on
2 the documents that have been produced by
3 Context in this case, that at least as of
4 Monday, January 9, 2012, Mr. Vandersteen had
5 not been successful in persuading Veronica or
6 Dr. Ferrari's office to switch. Is that
7 fair?

8 A. That sounds like a reasonable
9 conclusion, based on these documents.

10 Q. And now Mr. Vandersteen is
11 saying to Veronica, he says in that first
12 paragraph, "The Rheumatoid Health Network --"
13 and you understand that's Context, RHN, their
14 network?

15 A. I do.

16 Q. "The Rheumatoid Health Network
17 is significantly better, and that's why over
18 350 healthcare facilities had us replace
19 Healthy Advice last year." Do you see that?

20 A. I do.

21 Q. And is it your understanding
22 that that statement is just flatly false?

23 MR. HANKINSON: Objection.

24 A. I don't know.

1 Q. Based on the evidence you've
2 seen in the case, and your analysis of the
3 practices that switched, can you tell me
4 whether or not there's evidence to support a
5 statement that Context had switched
6 350 healthcare facilities from Healthy Advice
7 to Context in 2011?

8 A. I have some practice switching
9 documents according to Healthy Advice
10 Network's records that I brought with me
11 today related to the RHN and diabetes
12 networks in 2011. I can go look at those if
13 you'd like me to.

14 Q. No. If you can't tell me
15 offhand whether or not you think it's true
16 that RHN switched 350 practices from Healthy
17 Advice in 2011, I'll take that.

18 A. I don't recall the number of
19 practices in particular. And another caveat
20 is I don't recall if there's other networks
21 beyond the diabetes network or the RHN.

22 Q. Are you able to say to what
23 extent Veronica was influenced or impacted by
24 that statement?

1 MR. HANKINSON: Objection.

2 A. I, again, take at face value the
3 comments that were recorded in the CMS
4 database, and the associated testimony about
5 those comments. So that's the same answer as
6 the one that I was giving earlier today.
7 This hasn't changed my opinion on that.

8 Q. Right. It's not an answer to my
9 question. My question is, can you tell me to
10 what extent Veronica was influenced or
11 impacted by the statement by Mr. Vandersteen
12 that over 350 healthcare facilities had
13 Context replace Healthy Advice last year?

14 A. I don't have personal knowledge
15 of that. I would, in order to answer that,
16 would need to look at the CMS database, and
17 see what reasons that the HAN personnel
18 recorded for the transition, and review the
19 deposition transcripts to see if there's any
20 other evidence. I don't know otherwise.

21 Q. Is it your testimony that if a
22 statement like this, 350 practices switched
23 from Healthy Advice to Context, doesn't show
24 up in the CMS database, then it was not

1 significant or material to the practice?

2 A. My testimony is that -- my
3 understanding is that the CMS database
4 contains information that the practices
5 relayed to HAN, and that the HAN witnesses or
6 personnel were trained to try to solicit the
7 reasons as to why practices were switching,
8 and that they recorded those, and they
9 believed that those statements were truthful.

10 That's what is contained in the
11 CMS database that I considered and reviewed
12 in connection with my opinions here, along
13 with the deposition testimony.

14 If there were other factors that
15 also influenced that practice and enrollment
16 decision, beyond what's included in the CMS
17 database, that's not something that I have
18 personal knowledge about.

19 I would defer to the folks who
20 were involved in that, and if there's
21 information that's available that would allow
22 me to advance my understanding with respect
23 to any particular practice, I would be happy
24 to do so.

1 MR. COWAN: Okay. Could you
2 read him back my question. I'm going to have
3 her read you back my question. I want you to
4 try answering my question.

5 (The record was read by the court reporter.)

6 MR. HANKINSON: Objection.

7 A. That's not really the way that I
8 characterized my opinion.

9 Q. I'm sorry, sir. I'm not
10 interested in how you characterized your
11 opinion. I want an answer to my question.
12 It's a very specific question. Can you
13 answer my question?

14 A. I was trying to answer your
15 question, but now I'm -- can you please read
16 it back?

17 MR. COWAN: I'll have Sue read
18 it again.

19 (The record was read by the court reporter.)

20 MR. HANKINSON: Objection.

21 A. That's not my testimony.

22 Q. So it would be your testimony,
23 or it would be your belief that a statement
24 such as 350 healthcare facilities had Context

1 replace Healthy Advice last year could be
2 material to a practice, even though it
3 doesn't show up in the CMS database?

4 MR. HANKINSON: Objection. It
5 doesn't follow.

6 A. Could you please ask that be
7 reread?

8 Q. Sure.

9 A. Thank you.

10 (The record was read by the court reporter.)

11 A. I mean, hypothetically, it could
12 arrange -- there are a myriad of
13 considerations that the practices made, and
14 that hypothetically could be something that
15 would be important to a practice.

16 The question in my mind is
17 whether that changes, from a damages
18 perspective, HAN's entitlement to lost
19 profits damages and/or a portion of profits
20 that should be attributable to the alleged
21 wrongful conduct.

22 Q. In the second full paragraph,
23 now Mr. Vandersteen is saying, as of
24 January 9, 2012, third or fourth sentence in,

1 "Instead of a 30-minute PowerPoint slide that
2 consists of nearly 50 percent commercials, we
3 have award winning cooking shows, exercise
4 videos, and inspirational stories." Do you
5 see that?

6 A. I see that sentence.

7 Q. And you have told me before that
8 one of the factors that you believe
9 influences a practice's decision on which
10 provider to use is the percentage of ads on
11 the loop or content?

12 A. There was some testimony that
13 the advertising to content ratio was one of
14 the factors that practices considered, yes.

15 Q. That's one of the -- not only
16 testimony, you have it in your report as
17 being one of the factors that's considered?

18 A. It's on the bullet list of
19 factors that I am aware of, yes.

20 Q. So are you able to tell me
21 whether Veronica was influenced or impacted
22 by Mr. Vandersteen's statement that the HAN
23 30-minute PowerPoint slide consists of nearly
24 50 percent commercials?

1 A. My answer to this is consistent
2 with my answers to the other questions that
3 you asked me about the conversion of
4 practices, which is that my understanding is
5 based on the testimony and the comments that
6 were recorded in the CMS database. I don't
7 have personal knowledge about the influence
8 that the other alleged wrongful statements
9 had on the enrollment decision.

10 Q. So is your answer no, you are
11 unable to say to what extent, if any, this
12 statement that HAN's program consisted of a
13 30-minute PowerPoint slide that was nearly
14 50 percent commercials had on Veronica?

15 MR. HANKINSON: Objection.

16 A. It's a little bit more nuance
17 than that, because there are a lot of factors
18 that I understand drove the enrollment
19 decisions. And I considered the evidence
20 about those factors across the scope of
21 practices that were allegedly wrongfully
22 converted.

23 And it is true that I don't
24 know, with respect to the recipient of the

1 e-mail here marked as Exhibit 9, what impact
2 that particular statement had on her
3 enrollment decision. I'm not aware of
4 evidence that would tend to corroborate or
5 suggest that the damages quantified by
6 Dr. Wilner would flow from that for the
7 reasons I've articulated in my report.

8 Q. Well, if the Ferrari practice
9 decided to switch from HAN to Context because
10 it was told and believed that the HAN loop
11 consisted of nearly 50 percent commercials,
12 that would indicate that the wrongful conduct
13 caused that practice to switch?

14 MR. HANKINSON: Objection.

15 A. That's where I'm not necessarily
16 agreeing with you. I think there are other
17 considerations that one need to properly
18 consider in order to reach that conclusion.

19 Q. What are those?

20 A. You need to consider what would
21 have happened in the absence of the alleged
22 wrongful conduct.

23 Q. How would you make that
24 decision? How would you make that

1 determination?

2 A. By assessing the relative points
3 of the alleged wrongful conduct by way of
4 comparison with the other factors that
5 perhaps contributed to the decision of the
6 practice to convert from HAN to ContextMedia,
7 and then also by considering the alternatives
8 that were available to both the practice and
9 to ContextMedia in order to convert that
10 practice, and also consider whether or not
11 HAN had the capacity to make that sale from a
12 marketing standpoint, or to retain that
13 practice from a marketing standpoint.

14 Q. Well, does it not depend
15 entirely on the specific practice as to what
16 information influenced their decision?

17 A. It does depend on the practice
18 and what information influenced that
19 decision, and it also depends on what
20 alternatives were available at that practice
21 and to ContextMedia.

22 Q. Are you able to tell me that the
23 Ferrari practice did not switch because of
24 either the statement involving 350 practices,

1 or the statement involving the amount of
2 commercials on HAN's product?

3 A. The available evidence in this
4 case does not support the conclusion that the
5 practice switched because of the alleged
6 wrongful statements.

7 Q. And what is that evidence?
8 We're focusing on Dr. Ferrari. What is the
9 evidence that you say does not support the
10 conclusion that Dr. Ferrari switched either
11 because of the 350 practices statement, or
12 the 50 percent ad statement?

13 A. I'm not aware of evidence to
14 support the notion that it did. HAN
15 witnesses were asked to identify practices
16 that switched that were attributable solely
17 to the alleged wrongful conduct, and they
18 were unable to do so.

19 They also testified that they
20 were unable to -- that there were some
21 practices that were converted because of fair
22 competition. That was a word that the HAN
23 witnesses used, if memory serves, and that
24 there were others that they believed were

1 allegedly converted by unlawful means.

2 I'm not aware of identification
3 by the HAN witnesses that Dr. Ferrari's
4 practice was converted on the basis of the
5 alleged wrongful statements.

6 And there are a lot of factors
7 that these practices consider when they're
8 making their enrollment decisions.

9 I've considered those factors,
10 their relative importance, and in the case of
11 Dr. Ferrari's practice, what the HAN
12 witnesses identified as being important to
13 their enrollment decision.

14 Q. You would agree with me that the
15 HAN witnesses who were questioned by counsel
16 for ContextMedia do not know what Context
17 told the HAN practices?

18 MR. HANKINSON: Objection.

19 A. I don't know what -- whether
20 that's right or not.

21 Q. Well, let me ask you this: You
22 read Mr. Shah's testimony, right?

23 A. Yes.

24 Q. You read Mr. Purdy's testimony?

1 You did. It's in there.

2 A. Yes.

3 Q. They are Context's executives,
4 correct?

5 A. Yes.

6 Q. Sit in the same office with the
7 Context employees?

8 A. I presume.

9 Q. And you saw from their testimony
10 that they were unable to say what the Context
11 employees told each and every HAN practice?

12 A. I need to take a look at their
13 testimony in order to corroborate that. I'm
14 not recalling precisely, as I sit here now.

15 Q. Let me just ask you, as an
16 expert witness who is here to testify today
17 truthfully and honestly, can you tell me that
18 you believe that the HAN employees know what
19 each and every Context employee told each and
20 every HAN practice?

21 MR. HANKINSON: Objection.

22 A. Can you please repeat that?

23 MR. COWAN: Go ahead, Sue.

24 (The record was read by the court reporter.)

1 A. I don't know the answer to that.
2 That wouldn't be my suspicion, but I don't
3 know what the HAN employees know.

4 Q. Do you believe it's possible
5 that the HAN employees know what each and
6 every Context employee told each and every
7 HAN practice?

8 A. I don't think so, but I don't --
9 I think we were talking past each other a
10 little bit, because at first I thought you
11 were talking about a particular practice, and
12 now I think it's expanding to what every
13 Context person talked about, and so I don't
14 think it's likely that the -- or probable
15 that they so know what all -- all the various
16 communications.

17 With respect to what a
18 particular witness knew about a particular
19 practice, I don't know whether they had
20 knowledge of that or not.

21 Q. Right. And so when Context
22 attorneys ask a HAN employee, do you think
23 that maybe some of the practices left because
24 of fair competition, that answer that's given

1 is only as good as what they know was told by
2 Context to the practices, right?

3 MR. HANKINSON: Objection.

4 A. I don't think I could
5 necessarily agree with that. I mean, I
6 understand that these were corporate
7 witnesses that were designated to testify
8 about the subject matters, and they did so,
9 and so I took the testimony at face value;
10 and, again, it was generally consistent with
11 the documents that I saw, and that's what I
12 based my opinion on.

13 Q. Do you know whether there was
14 any HAN practice that was switched to Context
15 that was not lied to by Context?

16 A. I've made the assumption that
17 liability would be established as a predicate
18 assumption to my damages analysis. I don't
19 know the scope of the alleged wrongful
20 conduct as it relates to each and every
21 practice.

22 For instance, I understand that
23 I'm not aware of evidence that each of these
24 statements were made to each of these

1 practices, but I'm not -- you know, I am
2 assuming liability, though.

3 (Plaintiff's Exhibit No. 10
4 was marked for identification.)

5 Q. Plaintiff's Exhibit 10, the
6 final one on the Dr. Ferrari practice. Just
7 take a minute and read the top statement to
8 yourself, if you would.

9 A. (After reviewing document) I
10 read the top part, and a little bit of the
11 bottom part.

12 Q. You'll see here, where Brok now
13 is saying, as of March 26, 2012, "I just
14 wanted to let you know that we've finalized a
15 partnership with The Arthritis Foundation in
16 order to provide more programming for your
17 patients. We're the only network investing
18 in programming that actually helps patients
19 with rheumatic conditions." Do you see that?

20 A. Yes.

21 Q. That statement there, "We're the
22 only network investing in programming that
23 actually helps patients with rheumatic
24 conditions," do you believe that's a truthful

1 statement?

2 MR. HANKINSON: Objection.

3 A. I don't know.

4 Q. Do you believe that

5 Mr. Vandersteen is suggesting that Context is

6 the only provider that has a relationship

7 with The Arthritis Foundation?

8 MR. HANKINSON: Objection.

9 A. I don't see that in these words.

10 Q. You do see, though, in the

11 comments on 49 referenced by Veronica to The

12 Arthritis Foundation?

13 A. I see that, yes, on page 49.

14 Q. Take a look on your report at

15 the North Fulton Health Care Association, the

16 recorded comments. What is the specific

17 comment that she made that leads you to

18 believe that the practice enrollment decision

19 for that practice was ultimately based on

20 factors unrelated to the alleged wrongful

21 conduct?

22 A. You can see I provided a bold

23 statement there, in the paragraph on page 50

24 of my report, that the office explained that

1 they switched because the office had not been
2 offered an upgrade unlike all the other
3 related offices.

4 Q. Okay. And you see that that
5 statement, at least according to the comment,
6 came after Shannon at North Fulton said she
7 did not have a contract with PatientPoint.
8 HAN explained to her that she did have an
9 enrollment agreement signed in 2005; after
10 Shannon said that Context told her they were
11 authorized to remove the equipment, after HAN
12 explained to her that she was misled and the
13 other company does not have permission, and
14 they may have made her liable for return of
15 the equipment since they broke the enrollment
16 agreement, and after it's reported that
17 Shannon got really defensive at that time and
18 said follow up about what. Do you see that?

19 A. Well, I see that -- the sentence
20 that I explained comes after those other
21 statements in this paragraph.

22 I don't know that that
23 necessarily means that this paragraph was
24 recorded sequentially in order of the

1 conversation, but if that was the case, then
2 that would be right. I just don't know if
3 that's right.

4 Q. You assume that, though, don't
5 you?

6 A. I don't assume that.

7 Q. You don't?

8 A. No.

9 Q. So you've indicated that you
10 believe that, I think in your report you said
11 that the HAN employees meticulously record
12 the comments?

13 A. I think there was testimony
14 consistent with that.

15 Q. Yeah. If they meticulously
16 recorded the comment, would you expect them
17 to get them recorded in the order they
18 occurred?

19 A. I didn't make an assumption that
20 it was.

21 Q. Well, apparently, based on your
22 testimony, the order in which comments are
23 made is important to you?

24 MR. HANKINSON: Objection.

1 A. That's not what I said. I was
2 just trying to answer your question.

3 Q. What you said was, I'm not sure
4 that the testimony, that the statement came
5 in that order.

6 A. You asked me to corroborate that
7 it did come in that order, and I said I don't
8 know if it did.

9 Q. If it did come in that order, if
10 it came in the order that it's written in, do
11 you believe that all that proceeds it may
12 have impacted that which you are relying
13 upon, i.e., "She explained that she switched
14 because the office has never been offered an
15 upgrade unlike all of the related offices"?

16 A. My response is consistent with
17 my response on other similar questions, which
18 is I'm taking this at face value, and so
19 that's what I considered in my report.

20 Q. So you --

21 A. I don't have an opinion about
22 the -- to answer your question.

23 Q. So it's fair to say, then, that
24 you just pick the words out and don't try to

1 put them into context?

2 MR. HANKINSON: Objection.

3 A. I don't think I agree with that,
4 no.

5 Q. Well, the words that you're
6 relying upon are in context, correct?
7 They're in the context of an overall
8 conversation. You would agree with that?

9 A. There's other information here,
10 sure, yes.

11 Q. And the context in which they're
12 given has an impact on whether or not they
13 are truthful?

14 A. I don't know that I can agree
15 with that. I mean, my understanding is that
16 the HAN witnesses believe that the statements
17 that they received were truthful.

18 That's what the testimony is,
19 and I took it at face value. I provided the
20 whole passage here so as not to lose context,
21 but that is my -- the substance of my
22 testimony on that entry.

23 Q. You saw testimony, did you
24 not -- well, maybe you didn't read all the

1 HAN transcripts.

2 Did you see testimony from any
3 HAN witnesses that said that they felt like
4 practices often just gave them the reasons
5 that HAN wanted to hear so they could get off
6 the phone?

7 A. I'm not recalling that. I think
8 we should be able to confirm that by looking
9 at the transcript.

10 Q. Did you read Ms. Grippo's
11 transcript?

12 A. No.

13 Q. All right. If you could look at
14 the next entry for Rheumatology Associates of
15 South Florida.

16 A. (Complies with request.)

17 Q. Just read it over to yourself,
18 and I'll ask you a couple questions about it.

19 A. Sure. (After reviewing
20 document) Okay.

21 Q. In the middle, the recorded
22 comment says, "I asked if she --" and "I" is,
23 we would agree, is referring to the HAN
24 employee, "she" referring to Annette?

1 A. I'm not seeing that, but --

2 Q. Take a minute.

3 A. Oh, I see. I found it. And the
4 question is does the "I" refer to Annette?

5 Q. No. The "I" refers to the HAN
6 employee. Do you understand that?

7 A. That's my presumption, yes.

8 Q. And "she" would be Annette?

9 A. That sounds right.

10 Q. "I asked if she was told that
11 Context was authorized or that they had our
12 permission to remove our equipment. She
13 explained that was the reason she signed
14 papers giving them permission to remove." Do
15 you see that?

16 A. Yes.

17 Q. What papers do you understand
18 she's referring to?

19 A. It appears, based on that
20 statement, it was papers related to
21 permission to remove the HAN equipment from
22 the practice.

23 Q. Do you know whether Annette
24 and/or Rheumatology Associates would have

1 switched from HAN to Context if they were not
2 told by Context that Context had permission
3 to remove HAN's equipment?

4 A. The available evidence is that
5 they switched because the doctors were ready
6 for a change, and that they liked audio on
7 the program. I think it would be
8 unreasonable to conclude that they wouldn't
9 have switched and would have remained with
10 HAN for the duration of the period, as
11 forecasted by Dr. Wilner.

12 Q. What's the basis for that?

13 A. Well, I don't want to get us off
14 track, but I've provided and we talked about
15 before a bullet list of factors related to
16 demand drivers. There's also alternatives
17 that were available to the practice, to the
18 degree that they wanted to switch from HAN,
19 and also alternatives available to
20 ContextMedia that ContextMedia could employ
21 to entice practices to switch.

22 Q. And those are general comments.
23 They're not applicable to any specific
24 practice?

1 A. I think they're applicable to
2 all the practices.

3 Q. Do you know which of those were
4 applicable to Annette in Rheumatology
5 Associates?

6 MR. HANKINSON: Objection.

7 A. The alternatives are applicable
8 to Annette in Rheumatology Associates, and
9 factors related to the differences of the
10 products were attributable to that practice
11 as well.

12 Q. But here we have a specific
13 statement by a specific practice that she
14 explained that the reason she signed the
15 practices was because she was told by Context
16 that they had permission to remove the
17 equipment. That's how you read that,
18 correct?

19 A. Could I please hear that again?

20 MR. COWAN: Sue.

21 (The record was read by the court reporter.)

22 A. I read that as she signed the
23 papers to give them permission to remove the
24 equipment. That's the reason that she signed

1 it, according to the sentence.

2 Q. The sentence says, "I asked if
3 she was told that Context was authorized or
4 that they had our permission to remove our
5 equipment. She explained that was the reason
6 she signed papers giving them permission to
7 remove." How do you interpret that?

8 A. That she signed the papers to
9 give them permission to remove the equipment.

10 Q. Do you not read that as that she
11 was told by Context that they had permission
12 to remove?

13 A. I read that that she was told by
14 Context that she had permission to remove.

15 Q. And my question is specifically
16 related to Annette in Rheumatology Associates
17 of South Florida. Can you tell me that that
18 practice would have switched to Context if
19 Context had not told her that they had
20 permission to remove the equipment?

21 MR. HANKINSON: Objection.

22 A. I can tell you I do not believe
23 that that has been established by Dr. Wilner
24 or by HAN for the reasons that are

1 articulated in my report.

2 I think the conclusion that that
3 practice would have converted to ContextMedia
4 is a more reasonable conclusion on the basis
5 of the evidence available in this case.

6 Counsel, would it be okay if I
7 grabbed a coffee?

8 MR. COWAN: Yes. Let's take two
9 minutes, three minutes.

10 THE WITNESS: Great. Thank you.
11 (Brief recess.)

12 Q. I skipped over one that I should
13 not have. If you would go to page 49, the
14 John Hopkins entry.

15 A. Yes.

16 Q. Read that one to yourself, if
17 you would.

18 A. (After reviewing document) I
19 looked at it.

20 Q. So in this recorded comment,
21 Jonathan, who is with John Hopkins, told the
22 HAN employee that he signed a waiver provided
23 by Context that gave them permission to
24 remove our equipment. Do you see that?

1 A. Yes.

2 Q. And the HAN employee asked him
3 to fax him a carbon copy of the waiver, and
4 he said he would have his customer service
5 rep at Context fax it to us, to me. Do you
6 see that?

7 A. Yes.

8 Q. And then the HAN employee
9 apparently told Jonathan, or explained to
10 Jonathan that the enrollment form with HAN
11 said that only PatientPoint can service or
12 remove PatientPoint equipment. Do you see
13 that?

14 A. Yes.

15 Q. And his reply, and it's in
16 quotes, is, "I don't know who is lying to
17 me." Do you see that?

18 A. Yes.

19 Q. How did you interpret that
20 statement by Jonathan in this recorded
21 comment that you relied upon?

22 A. Can you be more specific? What
23 do you mean, how did I interpret that?

24 Q. Well, let me just -- maybe I

1 need to step back. When you see a customer
2 comment that you're relying upon that says "I
3 don't know who is lying to me," did you not
4 pay particular attention to that?

5 A. No. I was focused more on the
6 reason underlying the decision to switch to
7 ContextMedia.

8 Q. But you understand that this
9 case is about Context lying to practices?

10 A. I understand there's alleged
11 wrongful conduct. I understand that there
12 are allegations of that, yes.

13 Q. Would you agree with me that at
14 a bare minimum, this comment by Jonathan
15 evidences actual confusion on the part of the
16 practice?

17 MR. HANKINSON: Objection.

18 A. I don't know, from a legal
19 standpoint, if the word confusion has a legal
20 meaning or implication. I do --

21 Q. Assume it doesn't.

22 A. Okay. I'm under -- the plain
23 practical read of this paragraph indicates to
24 me that Jonathan at Johns Hopkins was advised

1 that ContextMedia gave -- that ContextMedia
2 received a waiver from Jonathan to remove the
3 equipment; that HAN explained that the
4 enrollment form said that only PatientPoint
5 could service or remove the equipment, and
6 that Jon didn't know what was right.

7 Q. He goes on to say, or the
8 comment goes on to say, "Jonathan said that
9 the Johns Hopkins' other rheumatology offices
10 are using RHN and like it because there is
11 much more information not repetitive with
12 interviews, newswires, and streaming
13 weather." Do you see that?

14 A. Yes.

15 Q. So that's information that was
16 provided by the other offices to Jonathan?

17 MR. HANKINSON: Objection.

18 A. Was your question did Jonathan
19 observe that by himself, or was he told that?
20 Is that the nature of your question?

21 Q. My question is, this would
22 indicate that that information was provided
23 to Jonathan by the other offices?

24 A. I don't know that you could make

1 that determination based on this sentence.

2 Q. How would Jonathan know that the
3 other offices liked RHN better?

4 A. Based on observing that and
5 discussing it with other folks.

6 Q. Let me ask you about the entry
7 on page 50 for C.A.R.E. Center. Do you see
8 that?

9 A. Yes.

10 Q. Take a minute and just read that
11 to yourself.

12 A. (After reviewing document) Sure.
13 I've reviewed it.

14 Q. Who do you understand, in the
15 part of this that you've bolded, it says "the
16 other company." Who is "the other company"
17 referring to?

18 A. If memory serves, this is --
19 these comments are all related to
20 ContextMedia.

21 Q. So, "The other company --"
22 referring to ContextMedia -- "provides a
23 three-hour loop each of rheumatology info and
24 allergy info." Do you see that?

1 A. I do see that.

2 Q. And if you'd look at page 29 of
3 your report, the second bullet point on page 29
4 says, "ContextMedia's content during the
5 period at issue ran on a 90-minute loop." Do
6 you see that?

7 A. I see that.

8 Q. So if the C.A.R.E. Center
9 practice was told by Context that it provides
10 a three-hour loop each of rheumatology info
11 and allergy info, that would be a lie; would
12 it not?

13 MR. HANKINSON: Objection.

14 A. This is a hypothetical question
15 because it says that the other company
16 provides a three-hour loop each of
17 rheumatology info and allergy info. That
18 doesn't say that that's what she was told.

19 I also note, in footnote 107 on
20 page 29 of my report, that ContextMedia
21 transitioned from the 90-minute loop to a
22 smart playlist that was more of a dynamic
23 media library. And so those are some of my
24 reactions to your question.

1 Q. Turn if you would to page 54.
2 You say in sort of the middle of your
3 paragraph that's after the quoted testimony
4 from Greg Robinson, "I am not aware of any
5 contention from HAN or Dr. Wilner that
6 practices that switched from HAN to
7 ContextMedia in the period following the
8 accord have done so as a result of any
9 alleged wrongful conduct." Do you see that?

10 A. Yes.

11 Q. Do you know whether Context
12 employees have continued to make false
13 statements to HAN practices after March 2013?

14 A. I'm not aware of that one way or
15 the other. And also as part of your question
16 that it was false statements, I mean, I'm
17 presuming liability here. That's not a
18 determination that I made. And so I think
19 that I'm having a little bit of trouble
20 navigating your question.

21 Q. Let me ask it a different way.

22 A. Okay.

23 Q. Do you know if Context employees
24 made false statements to HAN practices after

1 March 2013?

2 A. Same -- that's the same question
3 as the one that you asked me. I'm not
4 appreciating the difference.

5 Part of my challenge here is I
6 am not offering an opinion as to whether a
7 statement is false or not false. I'm just
8 presuming that there was alleged wrongful
9 conduct that constitutes false statements,
10 but I am not offering an opinion that it was
11 or wasn't.

12 And I understand that the
13 parties reached an accord that the witnesses
14 in the case have testified was the end of the
15 period of alleged wrongful conduct, and if
16 that's responsive to your question, then we
17 can --

18 Q. I can rephrase it, I think, to
19 ask it a better way.

20 A. Okay.

21 Q. Do you know whether Context has
22 engaged in any unlawful conduct relative to
23 HAN practices after March 2013?

24 A. That clarification didn't help

1 me navigate your question because, again,
2 it's presuming that I'm -- has a presumption
3 element of liability.

4 Q. It's not. It's not.

5 A. Yeah, I'm just not
6 understanding.

7 Q. It's just a simple question. Do
8 you know if Context employees engaged in any
9 unlawful or wrongful conduct with HAN
10 practices after March 2013?

11 A. I'm not aware of that.

12 Q. You don't know one way or the
13 other?

14 A. Well, I have an understanding,
15 based on the testimony in this case, that the
16 parties reached an accord, and that HAN
17 witnesses have testified that the alleged
18 wrongful conduct stopped at that period in
19 time, and that's the period in which
20 Dr. Willard truncated his damaged analysis,
21 save alleged lost growth, on the basis of the
22 historical period, and so that's something
23 that's part of the record of this case.

24 But I don't know whether HAN is

1 making allegations beyond that, and I also
2 don't know whether those are -- will be
3 ultimately found to be wrongful.

4 Q. Is it material to any of your
5 opinions whether Context continued to switch
6 out practices after March 2013?

7 A. I understand that they did
8 continue to switch out practices, and I have
9 considered that, yes.

10 Q. And you don't know, as you sit
11 here today, whether they did so based on
12 unlawful or improper conduct?

13 MR. HANKINSON: Objection.
14 Already asked and answered.

15 A. Yeah, I don't agree with that.
16 I considered that Context continually
17 transitioned practices before and after the
18 period in which there was an accord that was
19 reached.

20 And my understanding of the case
21 is that that serves as the end of
22 Dr. Wilner's damages period, save alleged
23 lost future growth. And I considered that,
24 along with the other evidence in the case, in

1 order to advance my thinking about damages
2 related issues.

3 Q. Do you understand this accord
4 that you've referred to as essentially
5 Context agreeing that it would no longer
6 commit bad acts?

7 MR. HANKINSON: Objection.

8 A. That's not consistent with my
9 understanding.

10 Q. Tell me what your understanding
11 of the accord is.

12 A. My understanding is that the
13 parties reached an agreement about the
14 process by which they would engage in
15 switching practices from one company to the
16 other.

17 I wouldn't want that to be
18 misconstrued as an agreement by ContextMedia
19 that it's -- the alleged wrongful conduct was
20 indeed unlawful. I'm just not offering
21 opinions about that.

22 Q. Do you know whether Context
23 employees made any untruthful statements to
24 any HAN practices after March 2013?

1 MR. HANKINSON: Objection.

2 A. Same answer as the one that I
3 gave before, which is I'm not aware. My
4 understanding is that the parties reached an
5 accord, and that the end of the period of the
6 alleged wrongful conduct was March of 2013.

7 And it's further complicated
8 by -- I'm assuming that the alleged wrongful
9 conduct was indeed wrongful. And your
10 question is asking me to assume, then, that
11 there's future alleged wrongful conduct.

12 Q. I didn't, but let me just make
13 it clear for the record. I'm not going to
14 try to trip you up, or use anything that you
15 say as a suggestion that you believe, because
16 you've assumed liability, that, in fact,
17 Context did anything wrong. You've made that
18 clear 20 times in this deposition and
19 throughout your report. Would you agree?

20 MR. HANKINSON: Objection.
21 Compound.

22 A. I think we understand each other
23 on that point.

24 Q. Right. So all I'm trying to

1 understand is you clearly place some
2 importance on the fact that Context continued
3 to switch out practices from HAN after March
4 2013?

5 A. I considered that, yes.

6 Q. And my only point is, you do not
7 know whether or not Context employees made
8 any untruthful statements to those practices
9 that switched after March 2013, do you?

10 MR. HANKINSON: Objection.

11 A. My understanding is that that
12 March 2013 marks the period in which the
13 alleged wrongful conduct stopped.

14 I included an excerpt of my --
15 in this report on page 54. Mr. Robinson
16 testified that save a handful of instances
17 which he would not constitute as a trend, to
18 his knowledge, ContextMedia did not continue
19 to engage in acts of alleged false
20 advertising and misleading statements. And
21 that's what I took as at face value.

22 Q. So to the best --

23 MR. HANKINSON: Excuse me. I'm
24 sorry.

1 MR. COWAN: Go ahead.

2 MR. HANKINSON: I have an
3 objection to this line of questioning. I've
4 just been stating objection. I would like to
5 make a comment, but if you would like to
6 excuse the witness first, that would be fine.

7 MR. COWAN: No. Go ahead.

8 MR. HANKINSON: I just want to
9 make the further statement that in addition
10 to Mr. Robinson's testimony, and the
11 testimony about the accord, Healthy Advice
12 has used the March 2013 date, and the
13 understanding between the parties that
14 alleged wrongful conduct stopped as of that
15 date for purposes of not producing documents
16 regarding things that occurred after that
17 date.

18 And so the extent that this line
19 of questioning wants to inquire into what
20 Mr. Arst knows and doesn't know about
21 evidence about what happened after that date,
22 and for them perhaps then imply that his
23 analysis is reasonable or unreasonable, I
24 think that that would be inappropriate, not

1 just based on the testimony that he had
2 access to, but also the discovery positions
3 of Healthy Advice.

4 MR. COWAN: And I appreciate the
5 comments, Tom. My understanding is that the
6 parties mutually agreed that there would not
7 be production of discovery or documents for
8 events after March 2013. It wasn't just
9 Healthy Advice took that position. It was a
10 negotiation and agreement on that point. Is
11 that fair?

12 MR. HANKINSON: That is fair,
13 except to the extent that the parties intend
14 to rely on documents that are coming from
15 after that date; and, you know, we can defer
16 to the e-mails. It was mutual.

17 The point being, though, that
18 Mr. Arst is not really responsible for that
19 accord, or the availability of information
20 after March 2013.

21 MR. COWAN: Right.

22 BY MR. COWAN:

23 Q. And my point simply is that you
24 are assuming, Mr. Arst, for purposes of your

1 opinions, that there was no wrongful activity
2 after March 2013. Is that fair?

3 A. I included the deposition
4 testimony of Mr. Robinson on the subject,
5 including the part in which he indicated that
6 there were a handful of instances that
7 perhaps constituted some alleged wrongful
8 conduct from his perspective.

9 But he also testified that he
10 did not constitute -- that that did not
11 constitute a trend, which is why I felt
12 comfortable looking at conversions before and
13 after 2013 as one element in the context of a
14 broader damages analysis.

15 Q. Do you know if Context in 2013,
16 the latter part of 2013, offered any special
17 incentives to its employees to switch out HAN
18 practices?

19 A. I'm not recalling that, as I sit
20 here now.

21 Q. Let me shift gears a bit and
22 fast forward to page 65, and talk about
23 unjust enrichment, if you don't mind.

24 A. Yes, sir.

1 Q. Did HAN suffer any harm or
2 damage as a result of losing practices to
3 Context?

4 A. HAN lost practices to Context.
5 Whether that caused damages, and about four
6 cents relates to the issues that we were
7 talking about before, but whether or not
8 but-for causation can be established.

9 Q. Yeah. I'm leaving aside the
10 but-for. My question was, specifically did
11 not suggest that HAN suffered harm or damage
12 as a result of Context's actions. I'm simply
13 asking did HAN suffer any harm or damage as a
14 result of losing practices to Context?

15 A. And that's what I want to be
16 careful about, the word "harm" or "damage,"
17 because in my mind, that has a linkage with
18 the alleged wrongful conduct.

19 I can agree with you to this
20 extent. HAN lost practices to ContextMedia,
21 and those practices were gained by
22 ContextMedia. Then there is a question as to
23 what impact does the alleged wrongful conduct
24 have on that.

1 Q. Fair enough. Did the loss of
2 the HAN practices to Context cause any
3 financial loss to HAN?

4 A. I have assumed that there could
5 have been some losses. I don't think that's
6 been established by HAN.

7 Q. You saw testimony from Mr. Shah
8 where he indicated that the loss of a
9 practice to Context was significant from a
10 financial standpoint. Page 73, the last
11 answer.

12 A. I see Mr. Shah's testimony on
13 page 73.

14 Q. And so you understood that he
15 believed that when Context loses a practice,
16 that constitutes significant value walking
17 out the door?

18 A. I understand that the company's
19 monetize practices through the sale of
20 sponsorship, and that they generate revenue
21 on the basis of practices.

22 Q. And is it your understanding
23 that the same is true for HAN?

24 A. I do understand that the same is

1 true for HAN. There are some differences in
2 the models that those companies employ, but
3 generally, they monetize practices through
4 the sale of advertising to sponsors.

5 Q. And so when HAN loses a practice
6 to Context, that has a financial implication?

7 A. Potentially.

8 Q. You used the term, on page 65 of
9 your report, "marketplace damages,"
10 Section 11. Do you see the term "marketplace
11 damages"?

12 A. Yes.

13 Q. What are marketplace damages?

14 A. We would need to look at the
15 cases there to see if those are defined. My
16 general understanding is actual damages is
17 the notion here.

18 Q. What types of actual damages?

19 A. Again, we need to take a look at
20 the particular cases, but --

21 Q. Well, let me just interrupt you
22 there. Why do I need to look to some legal
23 case to understand your term "marketplace
24 damages"?

1 A. Well, that's because that's
2 referencing principles that are identified in
3 those cases, which I haven't committed to
4 memory.

5 But generally, what I'm saying
6 is that my understanding is that profit
7 scores and remedies are equitable measures of
8 relief, and that actual damages, marketplace
9 damages, whether they were suffered, have
10 some bearing on -- from disgorgement damages
11 under the Lanham Act.

12 Q. So what are the types of
13 marketplace damages that a plaintiff in a
14 case like this might suffer?

15 A. Lost profits.

16 Q. Lost profits resulting from lost
17 practices?

18 A. Lost profits resulting from lost
19 sales. And I'm thinking about incremental
20 profits, which would be calculated as
21 incremental revenues less incremental costs.

22 Q. Leaving aside but-for causation,
23 the financial loss associated with HAN losing
24 a practice to Context, would that constitute

1 marketplace damages?

2 MR. HANKINSON: Objection.

3 A. I didn't understand the
4 question.

5 Q. Leaving aside the issue of
6 but-for causation, so leaving aside the issue
7 of whether or not any act of Context caused
8 the harm or damages, does the financial loss
9 associated with losing a practice from HAN to
10 Context, would that be considered a
11 marketplace damage?

12 MR. HANKINSON: Objection.

13 A. Sounds like you're asking me for
14 a legal conclusion, and that's not what I'm
15 trying to offer.

16 My understanding is that profit
17 disgorgement damages under the Lanham Act are
18 subject to the principles of equity.

19 And what I was simply trying to
20 say here is that I understand that the --
21 whether there were actual damages may impact
22 those from a -- is my understanding, and that
23 you're not automatically entitled to a
24 disgorgement of -- to disgorge profits, the

1 defendant, under the Lanham Act, that there's
2 other considerations there.

3 Q. You understand that, according
4 to Context's analysis as reflected in the
5 declaration offered by Mr. Demas, Context
6 believes 168 HAN practices switched to
7 Context?

8 A. I'd need to look at that. I'm
9 not recalling them as I'm sitting here now.

10 Q. Let me represent to you that
11 Mr. Demas has issued a declaration which
12 authenticates some documents produced by
13 Context which reflect 168 practices switched
14 from HAN to Context.

15 A. Okay.

16 Q. Assuming that to be the case, do
17 you believe that HAN experienced lost profits
18 associated with losing those practices?

19 MR. HANKINSON: Objection.

20 A. It's a complicated question, and
21 the answer is likewise nuanced. The question
22 in my mind is whether lost profits flowed
23 from the alleged wrongful conduct.

24 Q. Mr. Arst, that's not my

1 question.

2 A. I'm trying to get to your
3 question. And as I indicated, it's a nuance
4 question, in part, because the parties in
5 this case have adopted a framework for
6 measuring alleged damages that deviates to
7 some degree from the actual accounting
8 realities of the products in this
9 marketplace.

10 And so in order to answer that
11 question as to whether the loss of a practice
12 caused the loss of a dollar, even setting
13 aside the issues related to whether that loss
14 is attributable to the alleged wrongful
15 conduct, we would need to look at the
16 practices that were at hand at HAN, the
17 contracted minimums with the sponsors, the --
18 grace period is the wrong word, but there was
19 an allowance, generally, within the contracts
20 that if the enrollments fell below a certain
21 level, the -- there would be -- there's a
22 grace period.

23 And then we'd need to look at
24 whether or not the transition of particular

1 practices at a particular point in time would
2 have pushed HAN, so to speak, over that
3 threshold.

4 And then we'd need to look at
5 what the economic consequence of that would
6 be, in terms of make good payments or
7 otherwise, which, based on my understanding,
8 are sometimes made and sometimes forgiven.
9 And so I think it would really just depend.

10 The framework that the parties
11 have adopted, I think, as a matter of
12 convenience, is looking at a revenue per
13 practice per month, or revenue per physician
14 per month, which I think is a reasonable way
15 to think about damages in this case.

16 But your question, I think, was
17 asking me something a little bit different
18 that I'm having a hard time agreeing with
19 because of the complicated nature of the way
20 that the contracts work with respect to the
21 practices.

22 Q. And I can probably get to it
23 this way. I'll just ask you this question.

24 Do you have an opinion as to

1 whether HAN suffered any lost profits as a
2 result of the loss of the 168 practices to
3 Context?

4 A. I have assumed that they
5 suffered a loss. I don't know that that's
6 been -- I don't think that's been established
7 by HAN.

8 Q. I'm not interested in your
9 assumptions. I'm interested in your
10 opinions. Do you have an opinion -- I'm only
11 as good as what you're going to tell me
12 today. At some point in time, you're going
13 to get on the stand, and I want to be able to
14 know your answer to this question.

15 Do you have an opinion as to
16 whether HAN suffered any lost profits as a
17 result of the loss of the 168 practices to
18 Context?

19 A. Same answer as the one I gave.
20 I have assumed that that's true. I don't --
21 I have an opinion that HAN hasn't established
22 that. I've assumed that it's true. I don't
23 have an opinion that it is true, but I've
24 assumed that it's true.

1 Q. Are there any other types of
2 marketplace damages that might be suffered by
3 someone like HAN in this type of a case? And
4 again, leave aside whether or not they were
5 caused by anybody other than HAN.

6 MR. HANKINSON: Objection.

7 A. Lost profits, I think, could
8 probably encompass a range of adverse
9 economic consequences. Ultimately, though, I
10 think it would manifest itself in the form of
11 the profits.

12 Q. Is goodwill, loss of goodwill, a
13 marketplace damage?

14 MR. HANKINSON: Objection.

15 A. Sounds like a legal conclusion,
16 and I'm not trying to offer a legal
17 conclusion. But I would note that
18 ultimately, I would expect the manifestation
19 of damages to take the form of profits.

20 Q. Do you have an opinion as to
21 whether Context gained any sales as a result
22 of gaining the 168 HAN practices?

23 A. I want to separate sales from
24 revenue in this response. I understand that

1 ContextMedia generated revenue on the basis
2 of its practices by securing sponsorship
3 sales, and that revenue was generated on
4 ContextMedia's practices, including those
5 that were converted from HAN.

6 Q. And that's a fair qualification.
7 I probably shouldn't have used the term
8 revenue. So let me just ask it this way so
9 that the record is clear.

10 Do you have an opinion as to
11 whether Context generated any or gained any
12 revenues as a result of gaining the
13 168 practices from HAN?

14 MR. HANKINSON: Objection.

15 A. I have an understanding that
16 ContextMedia generated revenue by making
17 sales to sponsors that compensated
18 ContextMedia on the basis of practices, and
19 that included practices that were converted
20 from HAN.

21 Q. Do you have an opinion as to the
22 amount of revenues that were generated by
23 Context as a result of gaining the 168 practices
24 from HAN?

1 A. I performed calculations of
2 revenue and apportionment in the appendices
3 of my report. I think that I could find for
4 you, from an accounting perspective, the
5 results of that analysis with the caveat that
6 it was, again, a framework that was employed
7 by the parties in suit, I think as a
8 convenience, as a way of calculating revenues
9 and profits.

10 And there are some differences
11 between that framework that HAN and
12 ContextMedia have adopted for purposes of
13 this litigation, with the revenues and
14 profits that might be calculated under a
15 different framework.

16 Q. And would that be Exhibits 5.1
17 and their brethren? Well, actually, I
18 probably started at 5. I should have started
19 earlier.

20 A. Exhibit 5 represents my
21 corrections to Dr. Wilner's calculation of
22 revenue. I calculated revenue on Exhibit 2.1.

23 Q. Right. I'm just going to try to
24 stay in order of how your report flows.

1 Page 66, there's some reference to some
2 Context contracts.

3 The last sentence on that page
4 says, "Mr. Demas explained that contract
5 2013-9 is, in fact, the base contract for
6 325 screens, and that contract 2013-5 was an
7 amendment to that base contract, allowing the
8 same sponsor to buy additional screens above
9 the initial 325." Do you see that?

10 A. Yes.

11 Q. Were you ever provided with
12 unredacted copies of those contracts?

13 A. No, I don't believe so.

14 MR. COWAN: I'm just going to
15 mark them so I make sure we're talking about
16 the same documents.

17 (Plaintiff's Exhibit No. 11
18 was marked for identification.)

19 Q. I'm handing you what we've
20 marked as Plaintiff's Exhibit 11. Does that
21 appear to be a copy of the contract that's
22 referenced in your report as 2013-5?

23 A. From memory, it looks like it.
24 If I could take a moment here to corroborate

1 that, if you'd like me to?

2 Q. I mean, it's not really a test.
3 I pulled up what I understood to be the
4 copies. It probably would make sense just to
5 have you check just to make sure we're, at
6 least for the record, working off the same
7 documents.

8 A. (After reviewing document) This
9 is one of the contracts that was relevant to
10 that, yes.

11 (Plaintiff's Exhibit No. 12
12 was marked for identification.)

13 Q. I'm going to ask you if Exhibit 12,
14 which appears to be 2013-9. Exhibit 12
15 appears to be a copy of 2013-9. Does
16 Exhibit 12 appear to be a copy of the
17 contract you reference in your report?

18 A. I'll just note for the record
19 here that I'm referencing a binder that I
20 produced in connection with this case that
21 has the documents that I relied upon, and I'm
22 looking for that particular page.

23 Q. Gotcha.

24 A. Yes.

1 Q. Okay. As I understand it, what
2 Mr. Demas said was that Exhibit 12 is the
3 base contract; is that right?

4 A. That's my understanding. And
5 generally, the way that I think about this is
6 that the contract provided for \$174 per
7 screen per month, which is what's reflected
8 on Exhibit 3.7 of my report.

9 Q. And you understood from
10 Mr. Demas that Exhibit 11 was an amendment to
11 Exhibit 12?

12 A. My understanding is that the
13 Exhibit 11 sponsor entered into the contract
14 marked as Exhibit 11 to purchase additional
15 screens in line with ContextMedia's growth
16 forecast. And under both contracts,
17 Exhibit 12 and Exhibit 11, the monthly cost
18 of a sponsor for any given screen was \$174.
19 And I'm looking at footnote three on
20 Exhibit 3.7 of my report.

21 Q. And what's the basis of that,
22 your understanding, if both of them are 174
23 bucks per screen? Is that something that
24 Demas told you, or is that based on something

1 in the contract?

2 A. You can calculate that based on
3 the contract, but he also corroborated my
4 understanding of that.

5 Q. How do you calculate it?

6 A. I refer you to Exhibit 3.7 of my
7 report.

8 Q. Okay.

9 A. If you could just bear with me
10 for a moment, I'm going to check the math.
11 Okay.

12 Q. Walk me through it. Let me just
13 start by asking you, on Exhibit 11, the
14 amendment?

15 A. Yes.

16 Q. Which of these cells, if you
17 will, relate to the contract that is
18 Exhibit 12?

19 A. They all do.

20 Q. Okay.

21 A. So if I could just take a moment
22 to explain, or I can answer your questions,
23 however you like.

24 Q. Let me ask one more question,

1 and then I'll let you do what you should be
2 doing, which is explaining to me.

3 A. Sure.

4 Q. If I look at Exhibit 11, the far
5 left has something called com number. Do you
6 see that? What does that say?

7 A. I'm not sure where you're
8 referencing.

9 Q. You see the numbers 1, 2, 3, 4
10 in the far left, those cells?

11 A. Right here?

12 Q. Yep. What are those? There's
13 something that those are identifying as up
14 above.

15 A. It's hard for me to read that.

16 Q. Okay.

17 A. I think it might say contract,
18 but I'd need to see a cleaner printout of
19 this.

20 Q. Let's just assume it says
21 contract, just so we have a placeholder.

22 A. Sure.

23 Q. If you look at contract number
24 one, what's the start date? Would you agree

1 with me that the start date at least looks
2 like it starts in year 2012?

3 A. I think that's 2013.

4 Q. You do? Okay. For the start
5 date?

6 A. Well, I think I could explain to
7 you how to interpret these documents based on
8 what Mr. Demas told me.

9 Q. Okay. But I just -- and I want
10 to get there. I want to hear what Mr. Demas
11 told you, but when I read start date, and I
12 look at the number -- we can probably get a
13 better copy from Context, if necessary, but
14 when I look at start date and compare it to
15 the end date on Exhibit 11, it definitely
16 looks like a '12 and then '13. Do you just
17 disagree with that? If you want to, you can
18 compare contract number two, which also looks
19 like a 2012 and a 2013.

20 A. I'm having a hard time reading
21 those fields.

22 Q. Okay. If it's a 2012 -- and
23 let's just say I'm going to agree with Grant
24 for the purposes of this one question. If

1 the start date is 2012, would that make it
2 unlikely that this is an amendment to Exhibit
3 Number 12, which has a start date of 2013?

4 A. I'm -- no. I tried to
5 understand these contracts by speaking with
6 Mr. Demas, and when he explained it to me --
7 and I understand that these are amendments to
8 the contract.

9 Q. All right.

10 A. So I'm relying on Mr. Demas to
11 help me interpret these documents.

12 Q. Okay. Well, why don't you walk
13 me through how we get to \$174 doing your
14 analysis?

15 A. Sure. Let's start with
16 Exhibit 12. Now I've lost a little bit of my
17 train of thought, so if you could bear with
18 me.

19 Q. I will.

20 A. Thank you. We have a period
21 cost of \$56,550 on Exhibit 12.

22 Q. Right.

23 A. 325 screens yields \$174 per
24 screen.

1 Q. And is that \$174 per screen per
2 month?

3 A. Yes.

4 Q. Okay.

5 A. Now, when we get to April of
6 2013, and we look at this contract on
7 Exhibit 11, and you flip to the second page,
8 I think it's the second column here, which is
9 April 1, 2013 to April 30, 2013, it's in the
10 second row.

11 Q. Okay.

12 A. We've got \$8,700.

13 Q. Yes.

14 A. And we've got 50 screens.
15 \$8,700 divided by 50 screens is \$174 per
16 screen. And so you can see now, by reference
17 to Exhibit 3.7 of my report, the screen
18 guarantee went up in April from 325 screens
19 to 375 screens. That's the 50 screens that
20 we see in row two. And the extra cost was
21 \$8,700.

22 Q. Okay.

23 A. And that's how I -- my
24 understanding is how these documents work

1 together. Does that make sense to you?

2 Q. It does.

3 A. I'm sorry to interrupt. But if
4 we could take a quick break, I'd appreciate
5 that.

6 Q. Sure. That's fine.

7 A. Thank you.

8 (Brief recess.)

9 Q. All right. I think I'm done
10 with 11 and 12. Let me ask you a general
11 question, which I'm not sure if I'll either
12 ask it the right way, or if you can give me
13 an answer.

14 Is it fair to say that with
15 respect to Dr. Wilner's calculation of lost
16 profits, you agree with the methodology as it
17 applies to his deduction of expenses,
18 allocation of expenses?

19 A. So setting aside issues related
20 to the periods and the revenue streams, and
21 focusing just on the incremental cost
22 determinations I made, I think that those
23 were reasonable. I don't want that to be
24 misconstrued as an endorsement of other

1 aspects of this methodology.

2 Q. And I wasn't trying to imply
3 that. I'm truthfully just trying to
4 eliminate that area where we have
5 disagreement, and figure out where we agree
6 so we can focus on where we disagree.

7 And in terms of the expense
8 allocation of the adjustment for expenses,
9 that's an area that you don't have
10 disagreement with?

11 A. Same answer as the one I just
12 gave.

13 Q. On page 68, that first full
14 paragraph, you say, "Notwithstanding my
15 agreement with Dr. Wilner regarding the
16 deduction of incremental costs, I disagree
17 with Dr. Wilner's assumption that the
18 totality of the resultant incremental profits
19 is attributable to the alleged wrongful
20 conduct." Do you see that?

21 A. Yes.

22 Q. The last sort of couple
23 sentences later, you say, "Most importantly,
24 there is no evidence that the revenue

1 stemming from conversion of any physician
2 practice from HAN's ACN to ContextMedia's RHN
3 was attributable to the alleged wrongful
4 conduct." Do you see that?

5 A. Yes.

6 Q. Is that the primary disagreement
7 that you have with Dr. Wilner's conclusions?

8 A. That is one area of significant
9 disagreement, but there are others.

10 Q. What are the others? What are
11 the others, if you could just list them for
12 me?

13 A. Well, I've identified here, for
14 example, on page 68, other bullets that I
15 think one ought to consider when determining
16 the portion of the profits that were
17 generated by ContextMedia that is
18 attributable to the alleged wrongful conduct
19 by way of comparison with the other
20 contributions that ContextMedia made to its
21 products.

22 Q. Okay. So let me ask you about
23 Mr. Shah's testimony and e-mails, where he
24 uses a \$20,000 figure per practice. And I

1 think that begins, your commentary on that,
2 on page 72.

3 A. Yes.

4 Q. I'm going to hand you what has
5 been previously marked as Plaintiff's
6 Exhibit 95. Does that have yellow? Okay.

7 And then also I'm going to give
8 you what has been previously marked as
9 Plaintiff's Exhibit 136. And take a minute
10 and look at those.

11 My first question's going to be
12 whether those are the two e-mails that you
13 understand Mr. Shah was questioned about that
14 are the subject of your testimony? The
15 citations to his testimony in your report, I
16 should say.

17 A. These are looking familiar to
18 me, in particular Exhibit 95. If you'd like
19 me to spend the time, I think I could provide
20 the linkage. But if you can help me along,
21 that might expedite this.

22 I brought a copy of Mr. Shah's
23 deposition, and I see, for example,
24 Exhibit 135, of which I'm looking at --

1 Q. 135 or 136?

2 A. The transcript says Exhibit 135,
3 but it may be that it's the same. And I'm
4 happy to accept your --

5 Q. No, don't, because I'm not --

6 A. Okay.

7 MR. COWAN: Let's mark this,
8 Sue.

9 (Plaintiff's Exhibit No. 13
10 was marked for identification.)

11 Q. I'm handing you what we've
12 marked as Plaintiff's Exhibit 13. And it's
13 some pages from Mr. Shah's testimony. It's
14 pages 244 to 252.

15 And on page 244, I start by
16 asking him about Exhibit 95, which is one of
17 the exhibits I've given you. And you'll see,
18 referring to that exhibit, Mr. Shah talks
19 about "it's not based on a financial model,"
20 which is the testimony you've cited in your
21 report?

22 A. Yes, I see that. I've brought a
23 copy of his deposition and the references to
24 that.

1 Q. Okay. And then on page 247 of
2 Exhibit 13, his deposition, I marked
3 Exhibit 136, which is the other e-mail that
4 I've given to you, and then asked him
5 questions about that document, which I think
6 some of the testimony also found its way into
7 your report.

8 A. From pages 250 to 251 of
9 Mr. Shah's transcript?

10 Q. Right.

11 A. That appears to be so, yes.

12 Q. So let's just focus right now,
13 before we get into his testimony, with the
14 exhibits. The 136 comes first in time. And
15 this is a July 24, 2012 e-mail from Mr. Shah
16 to Mr. Garms, correct?

17 A. Exhibit 136?

18 Q. Correct.

19 A. Is from July 24th from Mr. Shah
20 to Mr. Garms, at least the top --

21 Q. The top portion?

22 A. -- portion.

23 Q. So the portion that I was
24 focused on in my questioning, and it's the

1 subject, I think, of your report is actually
2 the e-mail from Mr. Shah the day before,
3 July 23rd, 2012, to Mr. Demas, Mr. Purdy, and
4 the senior management team. Do you see that?

5 A. I do.

6 Q. Now, other than Mr. Demas and
7 Mr. Purdy, do you know who was included in
8 the ContextMedia senior management team?

9 A. Not without refreshing my
10 recollection perhaps by referencing
11 Mr. Shah's testimony.

12 Q. Mr. Demas, who is the direct
13 recipient of the e-mail, is the CFO of the
14 company?

15 A. Yes.

16 Q. And Mr. Purdy is the chief
17 operating officer?

18 A. Right.

19 Q. So at least the two people that
20 are named are senior executives within the
21 company?

22 A. That's my understanding.

23 Q. And down towards the bottom of
24 Mr. Shah's e-mail, he says, "Our 4-year value

1 to a site is at least \$16,000." Do you see
2 that?

3 A. Yes.

4 Q. And do you believe that's an
5 accurate value of the 4-year value for sites
6 to ContextMedia?

7 A. I don't have an opinion about
8 that. I did not attempt to perform a
9 valuation.

10 Q. Why not?

11 A. Because I don't think that that
12 is a measure of relief that's available upon
13 a finding of liability in this case. And we
14 talked a little bit before about the measures
15 of relief that are available.

16 My understanding, that it's an
17 accounting of profits and/or a lost profits,
18 and so this is not something that I viewed as
19 being a reasonable way to calculate either of
20 those measures.

21 Q. Well, the \$16,000 figure,
22 whether it's accurate or not accurate, do you
23 know what that figure represents? Is it
24 profit?

1 A. I didn't dig too deeply into
2 this, so no, I would need to defer these
3 questions to the folks who wrote these
4 e-mails in order to answer those questions.

5 Q. Well, you talked specifically
6 about this with Mr. Demas; did you not?

7 A. That's true, I did talk about
8 that with Mr. Demas, but I didn't ask the
9 question that you just asked me.

10 Q. So you actually talked to
11 Mr. Demas about this e-mail, about this
12 subject matter, and you didn't ask him if the
13 \$16,000 figure represents profits?

14 A. I did not ask him that question.

15 Q. Go down to the next paragraph,
16 where Mr. Shah says, "We have a very finite,
17 scarce amount of offices. We can't keep
18 finding them, so each one that slips out of
19 our hands is awfully valuable." Do you see
20 that?

21 A. I do.

22 Q. Do you have any reason to
23 dispute that?

24 A. I don't dispute that the

1 business that ContextMedia is in is to
2 monetize practices through sales to sponsors,
3 and that's part of what I think the essence
4 of what they're talking about here.

5 Q. Well, I'm being more specific.
6 Do you have any reason to dispute that each
7 practice that slips out of Context's hands is
8 awfully valuable?

9 A. The word "awfully" is not
10 well-defined here beyond the figures that are
11 contained in the e-mail, but I don't dispute
12 that the practices are of value to
13 ContextMedia, and I think that's the essence
14 of what they're talking about here.

15 Q. Then the next exhibit is
16 Exhibit 95. And the pertinent portion of it
17 is on the second page of the exhibit, which
18 is the e-mail on Monday, July 30, 2012, from
19 Mr. Shah, where he says, "Jim, Brad, this is
20 a top priority." Do you see that?

21 A. I'm not with you.

22 Q. You're not with me? Make sure
23 you have Exhibit 95.

24 A. 95?

1 Q. Turn to the second page, about
2 the middle of the page, you'll see where it
3 says "on Monday, July 30, 2012, at 11:16
4 p.m., Rishi Shah wrote"?

5 A. Yes, I see it.

6 Q. Are you there?

7 A. I see it.

8 Q. "Jim, Brad, this is a top
9 priority." Do you see that?

10 A. Yes.

11 MR. HANKINSON: 2012?

12 MR. COWAN: What did I say?

13 MR. HANKINSON: I think 2011. I
14 didn't mean to interrupt.

15 MR. COWAN: Not at all. If I
16 transpose my dates, correct me.

17 Q. "Jim, Brad, this is a top
18 priority." Do you see that?

19 A. Yes.

20 Q. Do you understand Jim and Brad
21 to be Mr. Demas and Mr. Purdy?

22 A. That's the way I understand
23 this.

24 Q. And at the end of his e-mail, he

1 says, "Each member lost is a \$20K loss,"
2 \$20,000 loss. Do you see that?

3 A. Yes.

4 Q. "Let's treat it with adequate
5 priority and get on this tomorrow." Do you
6 see that?

7 A. Yes.

8 Q. Did you talk to Mr. Demas about
9 this?

10 A. Yes.

11 Q. And did you ask him whether or
12 not the \$20,000 figure there represented lost
13 profits?

14 A. It doesn't -- my understanding
15 is it does not represent lost profits. This
16 is not a financial muddle that was performed.

17 So they're talking about
18 principles that I think are separate and
19 distinct from the damages calculations that
20 are at issue in this case.

21 Q. What did Mr. Demas tell you the
22 \$20,000 figure represented?

23 A. Oh, maybe I misunderstood your
24 last question. I mean, I understand that

1 this, based on the testimony, is -- they're
2 talking about the relative value of a
3 practice.

4 And my questions with Mr. Demas
5 were related to whether there's a financial
6 model from which one could calculate those
7 numbers, and his answer was no, there's not,
8 which is consistent with Mr. Shah's
9 testimony.

10 Q. Well, did you ask him how he
11 thought Mr. Shah came up with the \$20,000
12 figure?

13 A. No.

14 Q. In your report, you cite
15 testimony from Mr. Shah, where he tries to
16 put the \$20,000 figure in context?

17 A. That's a reasonable way to
18 characterize it, I think.

19 Q. And your citation ends at
20 page 251, I believe; is that right?

21 A. You know, I am sorry. It's
22 getting a little bit late in the day for me.
23 I'm trying to follow.

24 Q. Sure. And we're getting close

1 to being done. Page 74?

2 A. I'm on page 74.

3 Q. Right. So the citation that you
4 have from Mr. Shah's testimony that is
5 footnote 244 ends at page 251. Do you see
6 that?

7 A. I see footnote 244, I referenced
8 pages 250 and 251 of Mr. Shah's deposition.

9 Q. So in my Exhibit 13, your
10 citation to Mr. Shah's testimony ends at
11 Line 23 on 251; is that correct?

12 A. That's the part that I quoted
13 there.

14 Q. Yeah. So but the very next
15 question on 251 says, at Line 24, "When you
16 said in your e-mail to your colleagues at
17 Context that each de-install was like losing
18 \$20,000, was that a lie?" Mr. Shah answered,
19 "No, I don't believe it was a lie." Do you
20 see that?

21 A. Yes.

22 Q. Is there a reason why you didn't
23 include that in your report?

24 A. No. You could include that.

1 That wouldn't change the substance of my
2 opinions.

3 Q. And so you would agree that the
4 evidence that you reviewed is that Mr. Shah
5 has testified under oath that the \$20,000
6 figure is not a lie?

7 MR. HANKINSON: Objection.

8 A. I mean, his testimony on the
9 subject continues on through page 252,
10 including that testimony, so I understand
11 that.

12 Q. Given that Mr. Shah, in an
13 e-mail to the CFO and the COO, said that the
14 value of a practice is \$20,000, and given
15 that he testified under oath that that is not
16 a lie, do you fault Dr. Wilner for relying
17 upon that number in any of his work?

18 A. Yes.

19 Q. Why?

20 A. Because it's clear, based on the
21 testimony of Mr. Shah and my conversations
22 with Mr. Demas, that that valuation was not
23 the product of commonly accepted valuation
24 methodologies.

1 And further, it's my opinion
2 that damages ought to be measured by
3 consideration of whether and to what extent
4 time lost profits is attributable to the
5 alleged wrongful conduct, and by
6 consideration of the profits that were
7 generated by ContextMedia that's attributable
8 to the alleged wrongful conduct.

9 And looking at ContextMedia's
10 testimony related to the ten or \$20,000
11 figure doesn't answer either of those
12 questions.

13 Q. Now, you understand that the
14 Court, Judge Dlott in this case, will have
15 significant discretion with determining
16 whether and how much profit disgorgement to
17 allow?

18 MR. HANKINSON: Objection.

19 A. My understanding is that profit
20 disgorgement is subject to the principles of
21 equity. Some of the cases that I've been
22 involved in the trier of fact has been the
23 Court, and other instances where juries have
24 made those determinations, and -- but I do

1 recognize that the Court has discretion in
2 assisting in that determination, if not
3 making that determination. I think it just
4 depends on the particular case and what the
5 Court prefers to do.

6 Q. On page 65 of your report, in
7 Section 11, you say, "As previously
8 discussed, I understand that profit
9 disgorgement damages under the Lanham Act
10 are equitable measures of monetary relief
11 over which the Court has substantial
12 discretion." Do you see that?

13 A. Yes.

14 Q. Now, was that something you
15 were -- was that a concept you were aware of
16 and understood before becoming involved in
17 this case?

18 A. Yes.

19 Q. And have you ever been involved
20 in a case where profit disgorgement was
21 ultimately awarded?

22 A. I'm thinking of one case in
23 particular, yes, and I would expect there are
24 others, and I could refresh my recollection

1 by looking at my CV.

2 Q. Why don't you look at your CV.

3 A. I'm thinking of a couple cases
4 that may fit in the category of what you're
5 talking about.

6 I worked on a case involving pet
7 feed for alpacas, and there was a profit
8 disgorgement that was awarded. I was not a
9 testifying expert in that case.

10 Q. Were you on the plaintiff's side
11 or defendant?

12 A. If memory serves, the
13 defendant's side.

14 Q. Do you recall the law firm you
15 worked with?

16 A. That I don't recall. I recall
17 they were out of Colorado.

18 Q. Do you recall the name of the
19 defendant, at least the party on whose behalf
20 you were offering assistance?

21 A. I'm not recalling that. I
22 remember -- I can exhaust my recollection of
23 the case with you, if you'd like me to?

24 Q. Sure.

1 A. I remember that it was a case
2 involving, if memory serves, false
3 advertising under the Lanham Act involving
4 animal feed for alpacas.

5 There was a determination by the
6 jury that some portion of profits was
7 attributable to the alleged wrongful conduct,
8 and then I recall that the judge subsequently
9 modified that determination.

10 Q. You don't recall if that was in
11 state court or federal court?

12 A. I don't recall. I would expect
13 it would be in federal court under the Lanham
14 Act.

15 Q. Right.

16 A. I had another case that came to
17 mind, which was the Ethicon Endo-Surgery
18 versus Crescendo Technologies. And that was
19 a case that involved the alleged
20 misappropriation of trade secrets and breach
21 of contract that I valued. The jury awarded
22 damages, and I quantified damages in that
23 case.

24 Now, whether that was -- should

1 be characterized as a disgorgement of
2 profits, I think it could be, or it also
3 could be conceptualized as actual damages
4 because I was thinking about it in terms of a
5 reasonable royalty of what's the value of
6 what was allegedly mis -- or found to have
7 been misappropriated. There may be others.

8 Q. My understanding is that you
9 were not asked or engaged to try to place a
10 value on any of HAN's intellectual property?

11 A. That's reasonable.

12 Q. In any of your discussions with
13 anyone at Context, did you come to learn
14 whether Context has increased the amount of
15 its incentives that it is offering to
16 practices since the relevant time period in
17 question?

18 A. I don't recall discussing that
19 particular issue with ContextMedia, but I do
20 recall that there were some documents that I
21 reviewed and relied upon that contained an
22 accounting of the incentives that were used.

23 And I think I can find that
24 document for you, if you'd like, and we may

1 be able to look and see over time whether
2 there was a change.

3 MR. COWAN: That's okay. I
4 think that's all the questions I have for
5 you. Thanks.

6 MR. HANKINSON: I don't have any
7 questions.

8
9
10 _ _ _ _ _
11 KEVIN ARST

12 (DEPOSITION CONCLUDED AT 3:30 P.M.)

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C E R T I F I C A T E

STATE OF OHIO :

: SS.

COUNTY OF HAMILTON :

I, M. Sue Lopreato, the undersigned, a duly
qualified notary public within and for the State
of Ohio, do hereby certify that KEVIN ARST was by
me first duly sworn to depose the truth and
nothing but the truth; foregoing is the
deposition given at said time and place by said
witness; deposition was taken pursuant to
stipulations hereinbefore set forth; deposition
was taken by me in stenotypy and transcribed
by me by means of computer; deposition was
submitted to the witness for examination and
signature; I am neither a relative of any
of the parties or any of their counsel; I am
not, nor is the court reporting firm with
which I am affiliated, under a contract as
defined in Civil Rule 28(D) and have no
financial interest in the result of this action.
IN WITNESS WHEREOF, I have
hereunto set my hand and official seal of office
at Cincinnati, Ohio, this 9th day of September
2014.

M. Sue Lopreato
Notary Public - State of Ohio

My Commission expires:
May 10, 2015.